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In The

Supreme Court of the United States

October Term 1970

ADLER CONSTRUCTION COMPANY, a partnership constituted of Harold C. Adler and Vera L. Adler, Partners,
PETITIONER

V.

THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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The petitioner, by its counsel, respectfully petitions for a Writ of Certiorari to review the judgment and opinion of the United States Court of Claims in this case.

OPINION BELOW

The opinion of the Court of Claims and the Findings of Fact (set out in Appendix, *infra*, pp. 1 to 64) will be reported in — Ct. Cl. —. The opinion only appears in 423 F. 2d 1362 (1970).

JURISDICTION

The judgment of the Court of Claims was entered April 17, 1970. A timely Motion for a Rehearing to Alter or Amend Judgment (inclusive of Brief Material, Index and Supplemental Brief) was filed May 18, 1970, but such Motion was, with-

out opinion, denied on July 15, 1970. This Petition for Certiorari was filed within 90 days of that date. The Court's jurisdiction is invoked under 28 USC § 1255(1).

The Supreme Court's appellate jurisdiction by way of certiorari does not constitutionally extend to congressional reference cases. *In re Sanborn*, 148 U. S. 222 (1893). No part of the Court of Claims opinion below relating to a report upon congressional reference is involved in this petition.

QUESTIONS PRESENTED

This case involves claims of duress, overreaching, and deception, arising out of the government's dealings in a federal construction project with one of its contract bidders; and therefore necessarily requires substantial detail in pleadings and proof. A summary of the abusive dealings of the government are set out in the "Statement of the Case."

1. To what extremes may government agencies or employees resort to the use of economic duress, concealment of vital information, and untruths in the forcing or inducing of citizens who perform construction work for the government, to sign a standard printed government form of release used by the United States toward conclusion of its construction contracts?

2. Does a Contracting Officer, after he has once submitted a question for decision by the Comptroller General pursuant to the Dockery Act (31 USC § 74) thereafter have the right to disregard or frustrate a formally rendered decision allowing full correction of claimed error in bidding on a construction contract, especially when the Contracting Officer told the bidder that only the Comptroller General had authority to grant the relief requested?

3. Under 28 USC § 1255(1), which codified earlier statutes governing the scope of certiorari review to the Court of Claims (a trial court without any intermediate appellate

review), will the Supreme Court review and correct a decision of that Court based upon a critical conclusion of fact, which conclusion is contrary to the evidence, without support of substantial evidence, and manifestly erroneous?

4. Has the Court of Claims refused to recognize and apply in the subject case the long standing principles announced by the United States Supreme Court in

Freund v. *U. S.*, 260 U. S. 60 (1922), and
Robertson v. *Frank Brothers Co.*, 132 U. S. 17, 23 (1889),

and recent cases repeatedly reaffirming these principles in Court of Claims decisions:

Rappoli v. *U. S.*, 98 Ct. Cl. 499 (1943).
Chris Berg Inc. v. *U. S.*, — Ct. Cl. —, 426 F. 2d 314 (decided May 15, 1970)
Ruggerio v. *U. S.*, 190 Ct. Cl. —, 420 F. 2d 709 (1970)
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Urban Plumbing & Heating Co. v. *U. S.*, 187 Ct. Cl. 483, 408 F. 2d 382 (1969)

and thereby erred in failing to recognize that the petitioner was subjected to similar unlawful economic duress, overreaching, and bad faith and constructive fraud through the concealment of vital information, at a time when government representatives extracted his signature to a purported construction contract prior to start of construction, and demanded the purported releases from petitioner, toward the close of the project?

5. In a government construction contract situation, where the standard form of printed contract clause requires the contractor's performance to be continued in spite of disputes, may a contractor claim and prove following physical performance of the construction work that the construction contract

is a nullity by reason of unlawful economic duress, unlawful overreaching, bad faith, or constructive fraud used by the government in coercing the petitioner's entry into the contract and have recovery measured on the basis of *quantum meruit*?

STATUTE INVOLVED

The Dockery Act, as amended, 31 USC § 74, provides, in essential part, as follows:

> "Balances certified by the General Accounting Office, upon the settlement of public accounts, shall be final and conclusive upon the Executive Branch of the Government, except that any person whose accounts may have been settled, the head of the Executive Department, or of the board, commission, or establishment not under the jurisdiction of an Executive Department, to which the account pertains, or the Comptroller General of the United States, may, within a year, obtain a revision of the said account by the Comptroller General of the United States, whose decision upon such revision shall be final and conclusive upon the Executive Branch of the Government . . . .
>
> . . . .
>
> "Disbursing officers, or the head of any executive department, or other establishment not under any of the executive departments, may apply for and the Comptroller General shall render his decision upon any question involving a payment to be made by them or under them, which decision, when rendered, shall govern the General Accounting Office in passing upon the account containing said disbursement."

STATEMENT

This is an extraordinary case in government construction matters. The government, years after the work was com-

pleted, admitted that the purported construction contract was induced by unconscionable overreaching. The evidence shows the overreaching occurred simultaneously with a concealment by the government of vital information, which if disclosed, would have revealed that government representatives were negotiating in bad faith by using false statements, thus creating a reasonable opportunity for the petitioner to have resisted the government pressures. Once performance of work began, there were, the Court below found, numerous far-reaching breaches of contract [if there were a contract at all], radically changed conditions encountered but never paid for or even recognized by the Contracting Officer as existing, misleading plans and specifications, and undue acceleration of the work. All of these circumstances caused or contributed to the financial ruin of the petitioner.

As performance neared completion, the government then demanded releases from the financially ruined petitioner while simultaneously concealing additional vital information from him, and while continuing to fail performing its own contract obligations, such as refusing or circumventing, through a wrongful demand for releases, to perform its obligation to determine existence of gravely changed conditions.

The petitioner (sometimes called "Adler") made a grievous mistake in his bid to construct Pactola Dam near Rapid City, South Dakota. Adler, on September 30, 1952, bid $3,-761,115, omitting by mistake $621,465. The government estimate was $5,962,341. The second low bidder was $4,878,746 (Finding 7, App., *infra*, p. 11).

Adler's mistake was made known to the government representatives *before* award (Finding 11, App., *infra*, p. 13). Adler protested that no award should be made unless his bid be fully corrected. Nonetheless, the government did not

await a decision of the Comptroller General, but precipitously made award October 14, 1952 (though Adler's bid was available for acceptance for 60 days through November 29, 1952), thereby placing Adler's bid bond of $376,111 in jeopardy (Findings 11, 12 and 13, App., *infra*, pp. 13-15).

Immediately after award, government representatives told Adler that the Contracting Officer could not grant the relief he requested, but only the Comptroller General had such authority, and Adler should present proofs of claimed error at once (Finding 14, App., *infra*, pp. 14-15).

After examining Adler's proofs, the Contracting Officer forwarded them to the Comptroller General, together with his own written favorable recommendations stating (i) the errors had been made as claimed and their full correction would be in the best interests of the government, the bid as corrected being still $500,000 lower than next bidder, and (ii) in making award *prior* to the Comptroller General's opportunity to consider the matter, the Contracting Officer had no intention to prejudice any of Adler's rights to have his bid errors corrected. The Chief of the Bureau of Reclamation and the Administrative Assistant Secretary of the Department of the Interior joined in similar recommendations to the Comptroller General, *but all such facts were concealed from Adler* (Findings 16, 17, 18, App., *infra*, pp. 16-18, and Plaintiff's Exhibit U).

After the Comptroller General's decision, favorable to the petitioner, and without providing petitioner with a copy of the above decision and the other recommendations favorable to petitioner, the government representatives *suddenly changed position*. The Comptroller General's decision was frustrated and disregarded, in the amount of $136,240, shortly thereafter at a conference where petitioner was forced to enter into a so-called "Amendatory Agreement" conceived

and drafted by the government. While the government's representatives misrepresented and withheld such vital information, they simultaneously threatened to take Adler's bid bond if he refused to sign it that very day. The only explanation given to Adler for the abstraction of the $136,240 was "that's all we can pay" (Finding 20, App., *infra*, p. 17). The Department of the Interior years later admitted the government was at fault in overreaching petitioner, and pressuring him into accepting a proposition seriously adverse to his interests, which proposition "in good conscience, the government should never have made" (Finding 25, App., *infra*, pp. 22-24).

No consideration existed for such "Amendatory Agreement." None was paid to Adler. The only recited consideration (Finding 21, App., *infra*, p. 19) was that the government was giving up its right to rescind the alleged contract supposedly resulting from the award.

The above-described initial wrongful acts of the government were followed, upon actual construction, by a series of further wrongful acts or omissions to act which further intensified the financial weakening of petitioner, due to government fault (Findings 61 and 80, App., *infra*, pp. 51 and 64).

The Commissioner of the Court of Claims has now found these faults did occur (App., p. 2) and the defendant does not challenge or except to these findings (last sentence of footnote "*", App., *infra*, p. 8).

These matters for which the government is responsible or at fault include, among other matters: (1) the encountering of radically changed sub-surface conditions with unexpected vast overruns of scheduled quantities (overruning as much as 261%, involving unexpected excess excavation and refill yardage equal to a mass which would fill a string of gondola dump cars 132 miles long, related to the area of the main dam

foundation, which was about the size of 22 football fields), (2) excavation to a depth two or three times greater than represented on the drawings, (3) encountering of extremely rough, step-like and jagged rock surface at dam foundation whereas the drawings had represented it would be relatively smooth, (4) the cutoff trench was represented on the drawings as a maximum of 150 feet in width and in actuality was 500 feet in width, (5) the Contracting Officer declined or failed to decide whether a changed condition was encountered although requested to do so (see Finding 55, App., *infra*, pp. 45-46), even though the government had contracted in the standard contract form to make such a decision, (6) the government did not even answer plaintiff's letter of February 1954 complaining of misclassification of excavation materials, seriously lessening the amount of contract payment, such failure being in violation of the government's contract, (7) the specifications and drawings themselves were found by the Court to be misleading and inconsistent (Findings 32, 33, 34, App., *infra*, pp. 26-29), (8) these unexpected difficulties and misrepresentations resulted in the work being extended nearly a full year additional and into the most severe winter in 70 years, the Contracting Officer admitting Adler could operate at only 55% efficiency, (9) the government failed to conduct any subsurface investigation when it rotated the dam axis before bid, resulting in unrealistic estimates of quantities, (10) the government radically changed its original line for depth of excavation for the main dam, made a changed drawing, and then kept it secret from the petitioner.

Government representatives, toward the end of construction, again used the great power of the United States government arbitrarily to withhold a long and clearly deserved time extension, and to withhold moneys earned on certain prior changes, thereby coercing the bidder into giving, before any extension would be allowed, a purported general release (dated July 6, 1956) as to all claims arising out of any events to that date, and with no exceptions from that release being permitted. This first release, however, did not bar claims which are based

on circumstances arising *after* July 6, 1956, such as claims based on disputes over quantity count.

Though Adler was, in practicality, thus restricted from making any claims for all the wrongs and breaches described above arising out of events occurring before this first release, the government later demanded a second release (dated November 20, 1956) on a government printed release form. This form had a space for exceptions. Since he was already restricted against listing among exceptions on the second release those claims related to events occurring before July 6, 1956, which the first release had relegated to a barred status (i.e., changed conditions, misclassification, undue acceleration, misleading plans, failure to fully correct bid), Adler did not renege on the earlier release demanded of him. Thus none of those claims were listed as exceptions in the second release (dated November 20, 1956).

The Court below did not find the first release valid. Instead, the Court found that when the government asked for the second release which permitted the noting of exceptions, the government thereby "impliedly waived" the finality of the earlier release.

However, the defendant government never, as a matter of fact, waived the first release. Actually, the defendant government continuingly asserted the first release as a major defense.

The defendant government never told Adler that it had waived the first release or that he was at liberty to regard himself as no longer restricted by the first release. Nor did the government tell him he could now have the right to list as exceptions to the second release those claims he might desire to reserve growing out of circumstances occurring before the first release.

Both releases were exacted by the government while the plaintiff was in dire financial distress, which had been caused

by the government's own breaches and wrongs. The original purported construction contract (with the Amendatory Agreement), as well as both releases, were exacted during times when the government was withholding vital information from the petitioner which, if known, would have given him a fair chance to resist the signing of the purported construction contract (with the Amendatory Agreement) and the purported releases, and to establish the bad faith and overreaching of the government.

REASONS FOR GRANTING THE WRIT

Reason 1

The decision below constitutes an important (though erroneous) ruling as to when, and what degree and type of economic pressure the government may lawfully apply against a citizen in order to wrest from him a release, when such is done at a time when the releasor's known dire financial distress was caused by or contributed to by the government's wrongful acts and failures to perform its own contract obligations. Further, the decision makes a ruling as to what information known only to the government at the time the release is demanded may lawfully be concealed from the citizen, and, which, if known, would have given him a fair power to bargain and to make resistance *at the time the release is demanded*. The decision is contrary to the principles of cases earlier decided by the Court of Claims and to principles of the Supreme Court in *Robertson* v. *Frank Bros. Co.*, 132 U. S. 17, 23 (1889).

The decision below had to consider two affirmative defenses asserted by the government, namely, a first release dated July 6, 1956, purporting to release claims arising from events occurring *before* that date and exacting a restrictive promise from Adler that "no new claims for additional compensation will be made on the basis of anything occurring prior to July 6, 1956" (Finding 62, App., *infra*, pp. 51-52). This decision also had to consider a second purported release dated November 20, 1956 (Finding 67, App., *infra*, pp. 54-5).

Prior decisions of the Court of Claims and the Supreme Court have established the proper rule; but, such decisions erroneously have not been applied to the petitioner's case though they should apply with a result that the releases signed by Adler are rendered invalid and not binding. These cases include, among others, at least the following:

Aircraft Associates & Mfg. Co., Inc. v. *U. S.*, 174 Ct. Cl. 886, 357 F. 2d 377 (1966). In the course of this decision the Court stated:

> ". . . . There is no question that the government's wrongful [act] . . . contributed substantially to plaintiff's financial distress."

Further, the Court in quoting from its earlier decision of *James Shewan & Sons* v. *U. S.*, 73 Ct. Cl. 49 (1931), stated:

> "In cases of this kind the defendant should not be permitted to take advantage of its own failure to perform a solemn contract in order to exact from the other party to the contract a surrender of rights which he would not otherwise be compelled to give up."

The Court in *Aircraft Associates* stated further in its opinion (quoting from a United States Supreme Court case):

> "In that decision the court pointed out that settlements and payments exacted by officials of the government without lawful authority and in arbitrary fashion to which parties have yielded to escape financial disaster have been set aside on numerous occasions by the Supreme Court. Thus, in *Robertson* v. *Frank Brothers Co.*, 132 U. S. 17, 23 (1889), the Supreme Court stated:
>
> > 'When the duress has been exerted by one clothed with official authority, or exercising a public employment, less evidence of compulsion or pressure is required,—as where an officer exacts illegal fees, or a common carrier excessive charges. But the principle is applicable in all cases according to the nature and exigency of each.' "

An additional recent case of *Urban Plumbing & Heating Co.* v.*U. S.*, 187 Ct. Cl. 483, 408 F. 2d 382 (1969) is also directly applicable to establish the invalidity of these releases.

The principles of the United States Supreme Court and of the Court of Claims have not been followed in this case, as they should have been.

In the petitioner's case, the government expressly admitted that the government unconscionably failed to fully correct Adler's known bid error by $136,000 (Finding 15, App., 22-24) and the Court found that Adler encountered radically changed subsurface conditions, involving extremely excessive overruns, extraordinarily rough terrain, and undue acceleration (Opinion, App., *infra*., p. 2). Also, in the petitioner's case the Court below expressly found that the government's wrongful acts or defaults did cause or contribute to Adler's financial ruin, the Court stating in Finding 61, App., *infra*, p. 50, that:

> "Plaintiff's financial straits resulted from a combination of factors, including the government's decision not to correct the $136,000 error in plaintiff's bid . . . , the changed subsurface conditions and consequent overruns of excavation and fill, acceleration of contract performance through 1955-56 winter, the disparity in plaintiff's corrected bid compared to competing bids, alleged misclassification of excavation, retained percentages of progress payments, and the government's failure to pay him for certain Orders for Changes which plaintiff had performed. . . ."

The Court also pointed out he was still subject to large liquidated damages of about $255,000. To worsen matters, a government representative held this threat of large liquidated damages over petitioner like a sword of Damocles *until* such time as he would deliver the first release dated July 6, 1956. At trial, the Contracting Officer's representative admitted that the government continued for months to refuse to allow petitioner his entitled time extension so as to keep a "whip" over him (Transcript page 1265).

At the time the government demanded both of these releases it was concealing from petitioner many items of vital information, which if known, would have placed him on more equal terms with the government (*James Shewan & Sons, Inc.* v. *U. S.*, *supra*, pp. 83, 84) and thus have given him a reasonable opportunity to resist the government's demands. These include, among other things:

> A secret revised government drawing (Plaintiff's Exhibit Px CC-9a) which grossly changed the depth of the main dam foundation.
>
> A concealed rotation of the axis of the main dam without an additional subsurface inquiry as requested by the Chief Dam Design Engineer (Plaintiff's exhibit 4-Q's-3 and 5-D's), so that the government could make a realistic estimate of quantities; and, a concealment of the fact that the Contracting Officer, the Commissioner of the Bureau, and the Secretary of Interior had all recommended that there be allowed a full correction of petitioner's bid error, yet told petitioner falsely "that's all we can pay."

Had the Court followed properly the cases cited above, it would have concluded that both releases asserted as defenses were vitiated by unlawful duress and deception.

Reason 2

> The Court of Claims in its decision has permitted the Contracting Officer of the Bureau of Reclamation to ignore and act contrary to the decision of the Comptroller General which allowed full correction of Adler's mistake in bid,—whereas, the Comptroller General's decision should be held binding upon him and the Bureau under the Dockery Act, 31 USCA Sec. 74.

The text of 31 USCA § 74, in essential part, is set out at page 4, *supra*, under "Statute Involved." McBride and Wachtel, *Government Contracts*, § 7.30, and the Interior Department Board of Contract Appeals in *Richard J. Neutra and Robert E. Alexander*, 1964, BCA, paragraph 4485, at page 21,559

state that the decision of the Comptroller General is binding upon the government agency submitting the question of a mistake in bid, when voluntarily submitted jointly by the Contracting Officer and the contractor.

In the petitioner's case, the Contracting Officer told the petitioner that the Comptroller General was the only agency of the government authorized to grant him the relief he requested, namely, that his bid error be allowed correction. A joint submission was then voluntarily made by the Contracting Officer and the petitioner, followed by a formal decision of the Comptroller General allowing full correction of bid error. It was this decision which the Contracting Officer regarded as not binding.

The Supreme Court should clarify the effect of the Dockery Act and should find that the Contracting Officer had no right to disregard or frustrate the Comptroller General's decision.

Reason 3

The decision of the Court of Claims constitutes an important ruling in the field of government contracts, which field involves annual government expenditures in the billions. Moreover, the decision involves (but weakens) vital principles as to (a) what constitutes proper and fair procedure for making an award when the bidder claims a mistake in bid, and (b) whether a contract can result from an award made in respect of a bid known by the government to be in error prior to the moment of award, and (c) whether administrative agents for the government have the right to conceal vital facts when endeavoring to induce a bidder to accept a contract for substantially less than his known intended bid, under pain of having a bid bond seized. The decision below is contrary to other decisions of the Court of Claims and of the Supreme Court in similar situations, thereby leaving confusion as to a highly important aspect of government contracting.

. Petitioner submits that the facts of this case bring it almost on all fours with several earlier cases decided by the Court of Claims and by the Supreme Court, which decisions have been either ignored with resulting discrimination against plaintiff, or have been placed in doubt as precedents for guiding government contract representatives, as well as contractors, in their future relationships. The decision below, in permitting a form of conduct of government agents which reduces the quality of fair dealing on the part of the government, fails to demand that standard of fair dealing by government agents which would induce those who do business with the government to trust it as a contract party.

These earlier cases, which have been either ignored, or have now become beclouded as to whether they state the ruling case law within the original jurisdiction of the Court of Claims are:

Rappoli v. *U. S.*, 98 Ct. Cl. 499 (1943). Plaintiff was low bidder, but erred in his bid. He notified the Contracting Officer of the error *before award* and asked for award on the corrected bid basis. The Contracting Officer stated the Department had no desire to take advantage of a contractor's mistake and that the mistake could be corrected if plaintiff would submit its proofs through proper channels. Nonetheless, the Contracting Officer (on directions from a superior) awarded the contract on a basis of the mistaken bid before any decision by the Comptroller General.

The plaintiff there accepted the award but made it plain he expected it to be corrected. *Rappoli* presented proofs of error. The Contracting Officer was convinced a correctable mistake had been made. The Contracting Officer's department recommended to the Comptroller General that consideration be given to the claimed error. However, the Comptroller General decided *adversely* to plaintiff. Before the bidder learned of this ruling, he had signed the contract for the amount of the erroneous bid, anticipating correction. The Comptroller General would not reverse his ruling, and the plaintiff was

left for six years without bid correction permitted throughout all levels of administrative agencies, the defendant government using one excuse after another, —ultimately stating that the parol evidence rule prevented correction.

The Court of Claims said that correction was long overdue. See also the recent Court of Claims decisions affirming that there is no right even to make an award when the bidder earlier notified the government of a bid error. *Chris Berg Inc.* v. *U. S.*, — Ct. Cl. —, 426 F. 2d 314 (1970); *Ruggerio* v. *U. S.*, 190 Ct. Cl. —, 420 F. 2d 709 (1970).

Adler's case involves an even more gross governmental wrong, unfair dealing and bad faith. After the precipitous award, the government representatives told Adler that *only* the Comptroller General had authority to correct the claimed bid errors. As in *Rappoli*, Adler was told that his claimed errors must be presented and go through a routine of consideration (Finding 14, app., *infra*, pp. 14-15). That was done. Then after the favorable decision from the Comptroller General, the government agents *turned on Adler*, telling him they could allow him only partial correction regardless of the Comptroller General's decision and telling him falsely that "that's all we can pay," (Finding 20, App., *infra*, p. 17), and further telling him, in effect: you've signed a bid bond to us for $376,111; you're caught on it, and we will take it, if you don't agree to construct the job for $136,240 less than you intended to bid.

The government representatives further concealed from him that they had, at three levels of government within the Department of Interior, recognized that his errors had occurred as claimed, and that they should be fully corrected, and when corrected such would be to the advantage of the government because his corrected bid would still be $500,000 under the next low bid. This was all concealed from Adler until discovery proceedings brought it to light, and *long after any releases had been procured from Adler* (Findings 16, 18, 19, App., *infra*, pp. 16-17).

The Court of Claims below has now held that since Adler has signed a release, he's caught; and he cannot have relief even though petitioner did not know of the falsity of the government's representations at the time it forced him to sign the construction contract, and did not know of the concealed recommendations at three different levels of the Interior Department that his bid errors should be fully corrected.

In *Freund* v. *U. S.*, 260 U. S. 60 (1922), the Court held an unlawful duress had been exerted upon the contractor to force him to accept a materially changed contract or risk possible loss of bid bond. The Court nullified the purported contract.

The Supreme Court should, petitioner respectfully submits, grant certiorari, and, upon review, then advise those who would contract with the government how much deception, bad faith, or duplicity, and economic duress, government agents can engage in before a purported construction contract, so induced or procured by acts of bad faith or deceptive acts of those agents, will be found invalid.

Reason 4

The Court of Claims, a trial court without intermediate appellate review, has adopted findings of fact and conclusions of law which are *contrary to the only evidence in the record*, when it erroneously found that the defendant government had waived the first release dated July 6, 1956, and therefore erroneously found that Adler was not restricted in the exceptions he would be permitted to list in the second release dated November 20, 1956 on the standard government printed form. These manifest errors should be reviewed by the Supreme Court and corrected as permitted under 28 USC § 1255.

The Court below denied relief based on the second release of November 20, 1956 on the government's standard printed form. This conclusion was erroneous both as to evidence and law when it stated:

> "If this [i.e., the purported release letter dated July 6, 1956] were regarded as a release it could be considered as waived by subsequent conduct of the government in the release of November 20, 1956, which by permitting the noting of extensive exceptions impliedly waived the finality of the July 6 concession by the plaintiff. . . . "Irrespective of plaintiff's dire financial predicament (Findings 61 and 80), no conceivable economic coercion could invalidate a release, where, as here, there is no evidence that plaintiff was restricted in the scope of his exceptions to the release [of November 20, 1956] . . . . For all the record shows the 13 exceptions listed by plaintiff in the November 20, 1956 release which he signed were of his own free choice and represented all of the claims he then considered due him from the government, even though he may have previously announced his intention to make an extensive claim for his damages due to changed conditions and related delays (Finding 61). The time to have reserved such claims was upon the execution of the release, and we cannot passively assume that their reservation would have caused the government to deny him the final payment of withheld percentages. . . ." (Appendix, pp. 3-4)

In the light of the evidence before the Court, there is not a scintilla of evidence that the first release was ever waived by the government. This first release (dated July 6, 1956), conceived and drafted by the government near the end of performance of the project, provided that all pending claims arising up to July 6, 1956 were withdrawn and "no new claims for additional compensation will be made on the basis of anything occurring prior to July 6, 1956."

Thus, clearly by the terms of the release, petitioner was thereafter *restricted* against preserving any of these claims. It is important to observe that this first release did not bar any new claims so long as they would be based on circumstances arising *after* July 6, 1956, which could include quantity counts of the various items (for the government had not yet made the final count) or conceivably new change orders, if any, issued after July 6, 1956.

The Court, however, concluded that the second release dated November 20, 1956, on a government printed form providing space for listing of exceptions, must be regarded as impliedly waiving the first release.

The fallacy and injustice in this conclusion is four fold. First, with no evidence in the record of an actual waiver of the first release by the government,[1] the Court's ruling that a waiver occurred as a matter of law, appears to be based on the undisclosed premise that the second release (allowing for a listing of exceptions) is inconsistent with the first release. But these two releases are *not* inconsistent. The first release barred and restricted only those claims based on circumstances occurring before July 6, 1956, and was silent as to barring or restricting any claims based on events occurring thereafter. This was the office of the first release, as necessarily understood by the parties.

Thus, when the government sought the second release dated November 20, 1956, which provided a space for exceptions, such exceptions could, and in fact did, only relate to claims arising out of circumstances occurring after the execution of the first release. This was the office of the second release, and the parties so understood this limitation on the listing of possible claimed exceptions which could be preserved by listing in the second release.

Secondly, the Court has by its arbitrarily assumed waiver of the first release, let the mere form of the second release overcome the substantive restriction which the government had, in fact, forced from Adler by the first release, and which the government never, in fact, waived.

Thirdly, had the government, between July and November 1956, thought for one moment that it was to be regarded as

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[1] In fact, the government has always asserted the validity of this first release dated July 6, 1956, pleading such in its Third Affirmative Defense, which fact the Court decision below has completely ignored.

having waived the first release, it would have had a duty to so advise petitioner so that he would have the opportunity to list among the exceptions on the second release those claims previously barred by the first release.

Finally, if the government as a defendant had attempted to raise such an argument of waiver of the first release, it would have been estopped to do so, since it had demanded the first release, and steadfastly asserted its validity.

At no point in the decision does the Court find any validity for the first release, nor could it in view of the heavy and unlawful coercion and concealment of vital information then obtaining.

The Court below also erred when it found (App., p. 3) totally contrary to the only evidence in the record, that the petitioner did not assert his claim of changed conditions in timely manner. The petitioner made timely claim in writing on June 15, 1955 (Finding 54, App., *infra*, p. 44) and earlier oral notice. No objection was ever made (Plaintiff's Exhibit MMM) that this claim was out of time.

Reason 5

The Court below has erroneously held as a matter of law that once physical performance of a government construction contract is completed, there can be no claim made that the purported construction contract is illegal or otherwise to be held for naught, and recovery sought on a *quantum meruit* basis. This is contrary to prior decisions of the Court of Claims and of the Supreme Court, including *Freund* v. *U. S.*, 260 U. S. 60 (1922).

The Court below stated (App., *infra*, p. 7) that by the act of completing performance the plaintiff lost his right to rescission, as well as his right to deny existence of the contract, and could therefore not have relief on the measure used in *quantum meruit* cases.

The petitioner respectfully submits that no such rule has previously been asserted by this Court, or by the Court of Claims.

In *Freund* v. *U. S.*, 260 U. S. 60 (1922) this Court concluded that where the contractor continued the work to completion, in spite of the illegality of the contract which the plaintiff was wrongfully required by unlawful duress to continue and complete, there *is* a right to recover on *quantum meruit*. The Court stated:

> "The only course open to them was either to engage the old contractor's equipment, at a *heavy* loss, or throw up the original contract and run the risk of the government reletting at a higher bid and charging the possible heavy difference in cost to it against them or their bond for a five year contract. We cannot ignore the suggestion of duress there was in the situation or the questionable fairness of the conduct of the government aside from the illegality of the construction of the contract insisted on. . . .
>
> "We think the contractors are entitled to recover the *reasonable value* of their services for the 16 months, including a fair profit." 260 U. S. 70. (Italics supplied).

The contractor, in *Freund*, "did the work under it till the term ended." (260 U. S. at 61) Petitioner also points out that a government construction contract (including the subject contract form in the case at bar) is unlike other contract relationships in that it requires the contractor to continue performance in spite of any disputes.

Furthermore, in *Rappoli* v. *U. S.*, 98 Ct. Cl. 499 (1943); *Chris Berg Inc.* v. *U. S.*, — Ct. Cl. —, 426 F. 2d 314 (1970); and *Rhode Island Tool Co.* v. *U. S.*, 130 Ct. Cl. 698, 128 F. Supp. 417 (1955), the Court of Claims held the plaintiff was entitled to recover *even though he had fully completed physical performance.* In *Rappoli* and in *Chris Berg*, plaintiff was allowed to receive the added amount he

would have been paid if the errors in bid made known to the government before award, had been fully corrected.

In *Rhode Island Tool*, where the bidder made it known before award that he had made a mistake in bid, but did not make clear the amount of his error, the Contracting Officer nonetheless made *award*. This was held to be without right. Even though the contractor continued his performance to completion, he was allowed recovery on *quantum meruit* at a price based on unit prices of the next low bidder.

The principles of these cases have been ignored by the Court of Claims, and the Court has adopted an unsound stand on this issue.

CONCLUSION

For the reasons above, petitioner believes that the petition for writ of certiorari to the United States Court of Claims should be granted.

Respectfully submitted,

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October 1970

Appendix

In the United States Court of Claims

No. Cong. 10–60

(Decided April 17, 1970)

ADLER CONSTRUCTION COMPANY, A PARTNERSHIP CONSTITUTED OF HAROLD C. ADLER AND VERA L. ADLER, PARTNERS v. THE UNITED STATES

Richard W. Smith, attorney of record, for plaintiff. *Woods, Aitken and Aitken*, of counsel.

Ray Goddard, with whom was *Assistant Attorney General William D. Ruckelshaus*, for defendant.

Before COWEN, *Chief Judge*, LARAMORE, DURFEE, DAVIS, COLLINS, SKELTON, and NICHOLS, *Judges*.

OPINION

PER CURIAM: This case was referred to Trial Commissioner C. Murray Bernhardt with directions to make findings of fact and recommendation for conclusions of law under the order of reference and Rule 57(a) [since September 1, 1969, Rule 134(h)]. The commissioner has done so in an opinion and report filed on June 11, 1969. Exceptions to the commissioner's opinion, findings and recommended conclusion of law were filed by plaintiff. Defendant urged the court to adopt the commissioner's opinion as its decision in this case. The case has been submitted to the court on oral argument of counsel and the briefs of the parties. Since the court agrees with the opinion, findings and recommended conclusion of law, as hereinafter set forth, it hereby adopts the same as the basis for its judgment in this case. Therefore, plaintiff is not entitled to recover and the petition is dismissed.

OPINION OF COMMISSIONER

BERNHARDT, *Commissioner:* The issue of dispositive stature in this unduly protracted Government contract case is the validity of a release containing express reservations executed by plaintiff contractor in November 1956 following completion in August 1956 of a dam he built for the Bureau of Reclamation. The finality of the release is so apparent as to obviate a more than cursory recital of the issue-related facts so prolixly established in the accompanying findings, and to permit the omission entirely from such findings of those facts relating to the damage issue despite the wealth of record thereon.[1]

If valid and not waived, the release extinguishes all of plaintiff's present claims sounding in changed conditions, cardinal change, misrepresentation, erroneous classification of excavated materials, and errors in bid, since none of these are preserved, specifically or inferentially, by the 13 enumerated exceptions to the release. See *H.L.C. & Associates*, 176 Ct. Cl. 285, 376 F. 2d 586 (1966) and cases cited therein.

After partial correction of obvious errors in plaintiff's improvidently low bid (findings 5–25), the plaintiff was given notice to proceed in November 1952, reaching substantial completion on August 15, 1956, instead of the original completion date of June 25, 1955 (finding 26) the delays being covered by time extensions (finding 6). Radically changed conditions were encountered (findings 28–38), involving not only excessive overruns of excavation and fill material at the main damsite (findings 39–41), but also extraordinarily rough foundation terrain (findings 37–38), which completely disrupted and slowed down plaintiff's planned work sequence and increased his costs commensurately (findings 50–52), as well as occasioning demands by the contracting officer for acceleration of the work (findings 53–57), including working through the markedly severe winter of 1955–56 at a loss of 45 percent efficiency (findings 58–60). The circumstances were ideal as the basis of a claim

[1] Considering the time and expense involved in this lengthy litigation, it is regrettable that the parties did not fully explore the release issue by a dispositive motion at a much earlier stage, as was suggested by the trial commissioner's letter of March 6, 1961.

under the changed conditions clause of the contract, but such a claim was not presented in season.

On July 6, 1956, the plaintiff, in consideration of the payment of $43,314.39 for certain changes, agreed in writing to withdraw all then pending claims for compensation and to make no new claims for additional compensation on the basis of anything occurring prior to that date (findings 62–64). If this were regarded as a release it could be considered as waived by subsequent conduct of the Government in the release of November 20, 1956, which by permitting the noting of extensive exceptions impliedly waived the finality of the July 6 concession by plaintiff. *See Winn-Senter Constr. Co.* v. *United States*, 110 Ct. Cl. 34, 65–66, 75 F. Supp. 255, 260 (1948).

On November 20, 1956, the plaintiff, in consideration of the payment of $213,562.60 ($212,319 of which represented 10 percent withholdings from progress payments through August 1954 pursuant to Article 16 of the contract), signed an official release form in which he—

> * * * remises, releases, and forever discharges the United States of and from all manner of debts, dues, sum or sums of money, accounts, claims, and demands whatsoever, in law or in equity, under or by virtue of the said contract, except contract items and quantities as listed on the reverse side hereof.

The reverse side of the release summarized 13 exceptions totaling $198,633.20, consisting almost entirely of disagreements on specific quantities of excavation and fill identified to specific item numbers in the contract specifications.

It is noteworthy that none of the claims constituting the present action were excepted from the foregoing release. No matter how meritorious may be the claims not excepted by a contractor from the operation of a full, valid release under a Government contract (and we might well feel that certain of plaintiff's non-excepted claims made here were of intrinsic merit had they been kept alive), they may not be judicially entertained later unless the release be found invalid or waived by subsequent conduct of the Government, both of which grounds plaintiff advances. *See J. G. Watts Constr. Co.* v. *United States*, 161 Ct. Cl. 801 (1963). The

claim of invalidity of the release is based on alleged economic duress, and on the further ground that since the release was signed pursuant to Article 16 of what the plaintiff considers to be a contract void *ab initio*, the release itself is ineffectual. Neither argument convinces.

Irrespective of plaintiff's dire financial predicament (findings 61 and 80), no conceivable economic coercion could invalidate a release where, as here, there is no evidence that plaintiff was restricted in the scope of his exceptions to the release. *Cf. Harvey-Whipple, Inc.*, v. *United States*, 169 Ct. Cl. 689, 697–99, 342 F. 2d 48, 53 (1965). For all the record shows the 13 exceptions listed by plaintiff in the November 20, 1956 release which he signed were of his own free choice and represented all of the claims he then considered due him from the Government, even though he may have previously announced his intention to make an extensive claim for his damages due to changed conditions and related delays (finding 61). The time to have reserved such claims was upon the execution of the release, and we cannot passively assume that their reservation in the release would have caused the Government to deny him the final payment of withheld percentages. Plaintiff's contentions now urged that he lacked sufficient information at the time of the release to frame proper exceptions to reserve his present claims, and that he obtained the necessary data only in the course of discovery proceedings in this action, do not excuse his failure to state his exceptions covering his present claims in general terms which would have sufficed the purpose of preserving his right to pursue them. *See Ft. Sill Associates*, ASBCA No. 7482, 963 BCA ¶ 3869.

Nor does it appear that any conduct of the Government subsequent to the release constituted a waiver thereof. On August 23, 1957, the Bureau of Reclamation wrote plaintiff to inquire when he would supply additional data with respect to the items excepted from the release, advising that findings of fact would be issued within 60 days on the basis of available information concerning the excepted claims unless plaintiff filed additional data in the meantime (finding 70). After the Bureau found an additional $530.75 due plaintiff from one of his excepted items, and denied the remaining excep-

tions in findings issued February 7, 1958, the plaintiff appealed and for the first time on March 3, 1958, made a claim resembling changed conditions in very general terms (findings 72 and 73). Upon forwarding the appeal to the Board of Contract Appeals the Bureau wrote to plaintiff on March 20, 1958, reciting the chronology of events since the November 20, 1956 release, and the unsuccessful efforts made by the Bureau to confer with plaintiff concerning the details of plaintiff's claims, and offering to arrange a meeting to discuss any errors in calculations (finding 74). This letter plaintiff considers to constitute a waiver of the release by the contracting officer because the latter did not complain that the claim of changed conditions made by plaintiff for the first time in his appeal was improper. However, the tenor of the letter is such that it must be considered to relate only to negotiations concerning the items excepted from the release. An ensuing conference between the parties resulted in supplementary findings by the contracting officer dated November 14, 1958, which found plaintiff to be due an additional $13,558.53 relating to items which had been excepted in the release, but specifically denying plaintiff's claim for delays because of his failure to except such a claim from the operation of the release (finding 77).

By letter of January 30, 1959, the plaintiff accepted the award of the additional sums as "satisfactory settlement of all claims under the afore-mentioned contract", except as to plaintiff's claim made for the first time in his notice of appeal of March 3, 1958, which claim plaintiff reserved and expressed his intention to appeal (finding 78). Plaintiff's timely appeal on February 28, 1959 to the Interior Department Board of Contract Appeals was dismissed on the Government's motion on the ground that plaintiff's claims sounded either in misrepresentation or called for recovery of unliquidated damages, over which the Board had no jurisdiction (finding 79).

This record of events discloses no waiver by the Government of its rights under the release of November 20, 1956. On the contrary, it is quite clear that following the release the Bureau of Reclamation's sole efforts were directed to negotiating a settlement of those claims which plaintiff had

expressly excepted from the release and, furthermore, that the Bureau steadfastly excluded from its consideration any claims by plaintiff which exceeded those which he had reserved from the release. The unilateral action of the plaintiff in making a formal claim for non-excepted items of recovery in no way constitutes a waiver of the release by the Government unless by its conduct the Government indicates a willingness to entertain them regardless of the release.

The plaintiff also contends that the last "release" of January 30, 1959 was invalid due to economic duress, but again the facts disclose no more than that the plaintiff was in desperate financial condition and that his acceptance of an ultimate payment of $14,089.28 in settlement of claims totaling $198,633.20 reserved from the November 20, 1956 release was the product of extensive arm's length negotiations and concessions between the parties (findings 75–77). The plaintiff's letter to the Bureau of Reclamation dated January 30, 1959 (finding 78) acknowledges the outcome of the negotiations to have been a "satisfactory settlement" of all claims which had been excepted from the release of November 20, 1956, and excepted only a general claim for "additional compensation for increased costs on the items stated therein, because these additional quantities extended the performance of the contract beyond the period foreseeable at the date of its execution". Assuming that this sole exception sounded in delay-damages, there is no indication that plaintiff was prevented from incorporating further exceptions relating to claims for changed conditions, rectification of bid errors, misclassification of excavated material, or misrepresentation, which form the broad basis of the present action, or that he was prevented from excepting those specific items of his basic list of earlier exceptions which were deleted in their entirety from the final settlement. Nor did the unilateral exception by the plaintiff in his final "release" covering a vague delay-damages claim have the effect of reviving such a claim when it was not included in the exceptions to the earlier release of November 20, 1956, and was thereby foreclosed by that release, particularly when the Bureau of Reclamation explicitly disclaimed any responsibility for claims which were not reserved in the November 20, 1956 release.

The second ground relied on by plaintiff to invalidate the release of November 20, 1956 (as well as the quasi-releases of July 6, 1956 and January 30, 1959), is that any release predicated on the terms of a provision in a contract that itself is void necessarily vitiates the release, since the claims supposedly released were claims arising under and by virtue of a contract which never had legal existence. No authority is cited for this novel proposition and it is suspected that none could be, for even if the premise of a void contract were assumed to be correct no reason is apparent why that should affect the voluntary agreement of the parties to give a release of claims arising under a *quantum meruit* performance in exchange for a valid consideration in the form of payment. In point of fact, however, the premise itself is suspect, for at best the contract awarded plaintiff initially was voidable rather than void (*see Dougherty* v. *United States*, 102 Ct. Cl. 249, 259 (1944)), and plaintiff's proper action would have been to bring an action for rescission. *See Alta Elec. & Mech. Co.* v. *United States*, 90 Ct. Cl. 466, 479 (1940). By the act of performance the plaintiff lost his right to rescission (WILLISTON ON CONTRACTS, Rev. ed., Vol. V, § 1580), as well as his right to deny existence of the contract.

One of the plaintiff's several causes of action is for $136,240 consisting of the uncorrected portion of obvious errors in plaintiff's bid. Findings 5 through 25 explore the details thoroughly and create the distinct impression that, although the release signed by plaintiff on November 20, 1956 bars all legal rights to recovery, there is nevertheless strong moral justification in a non-juridical equitable sense (as defined in *Harvey-Whipple, Inc.*, v. *United States*, *supra*), for recognition and repayment of this portion of the claim to plaintiff. So clear are the plaintiff's moral rights to reimbursement that they prompted the favorable recommendation for recognition by the Under Secretary of the Interior in his letter of July 5, 1960, to the Senate Judiciary Committee (finding 25).

Were this item of claim to still be before the court as a congressional reference claim filed here pursuant to S. Res. 288, 86th Cong., as authorized by 28 U.S.C. §§ 1492 and 2509

(1958 ed.), it would merit the court's recommendation to Congress for allowance on non-juridical equitable grounds. However, the court's order of July 2, 1964, responding to defendant's motion, dismissed the congressional reference aspect of plaintiff's claim because of views expressed in the separate concurring opinion in *Glidden Co.* v. *Zdanok*, 370 U.S. 530 (1962), leaving the claim with the court solely for the purpose of entering judgment pursuant to 28 U.S.C. § 1492 (1958 ed.), since the claim is one lying within the court's general jurisdiction. On four successive occasions the plaintiff endeavored unsuccessfully to have the court reconsider its order, but in the meantime the court had made its report to the Senate and returned the reference papers to the cognizant committee, thus terminating any province for the court at this juncture to make any favorable recommendation for equitable treatment by the Congress.[2]

From a legal standpoint the plaintiff effectively released the Government from liability for any reimbursement claims it may have had, and the petition should be dismissed.

Findings of Fact*

1. At relevant times plaintiff was a partnership consisting of Harold C. Adler and Vera L. Adler, his wife, with its principal place of business presently at Littleton, Colorado.

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[2] On March 29, 1968, the court entered an order denying plaintiff's motion for reconsideration of the court's order of July 2, 1964. On that date the court had entered an order dismissing that portion of plaintiff's claims which sought equitable relief pursuant to a reference from Congress under the provisions of 28 U.S.C. § 2509, prior to the amendment of that statute on October 15, 1966. The order of March 29, 1968, stated that plaintiff's motion be and the same is hereby denied, without prejudice to plaintiff's right to seek a congressional reference of its claims to the Chief Commissioner of the Court of Claims pursuant to 28 U.S.C. § 2509, as amended October 15, 1966, and if successful in obtaining such a reference to move for dismissal of this action without prejudice. [Footnote by the court.]

* The court has reviewed and rejected the significant exceptions plaintiff has taken to the trial commissioner's findings with respect to the matter of the releases. In view of the disposition of the case, the court has not undertaken the academic task of passing upon plaintiff's minor and insignificant exceptions with respect to the matter of releases, or its exceptions with respect to the changed conditions, the exact extent of the errors in its original bid, and other matters not pertinent to the subject of the releases. The defendant filed no exceptions and must therefore be taken to acquiesce in the findings. [Footnote by the court.]

Hereinafter "Adler" shall refer to the individual or the partnership as the context suggests.

2. The case presents certain claims in connection with the construction by plaintiff for the Bureau of Reclamation (hereafter "Bu Rec" shall usually refer to the Denver office of Bu Rec unless the headquarters office in Washington is specified as "Washington Bu Rec") of an earth-filled dam called Pactola Dam, at a site some 13 airline miles west of Rapid City, South Dakota. The principal claims relate to defendant's failure to fully correct mistakes in plaintiff's bid, unanticipated subsurface conditions, excavation overruns, disputed excavation classifications, work acceleration, and collateral matters.

3. Pactola Dam was planned and constructed as an earth and rock-filled dam, about 1,250 feet long at the crest and with a height, as described in the specifications, of approximately 230 feet above the lowest foundation. Dikes 1 and 2, 1,500 feet north of the main dam, were 2,160 feet in length and had crests level with the dam crest. Water impounded by the dam was released through an underground outlet works consisting of a concrete-lined tunnel north of the dam and a vertical shaft giving access to water control gates. A concrete spillway bored through rock providing for emergency overflows was located between the dam and Dike No. 1.

4. Adler has had extensive experience in construction work, initially as a young boy serving as a laborer in his father's construction company, then performing small construction jobs independently in his college years, and later becoming his father's partner from about 1935 until the father's death, whereupon Adler continued the business through the contract in suit. Since then his scale of operations has been greatly reduced due largely to the economic and credit consequences of the instant contract performance. Prior to the contract in issue the company performed many heavy construction contracts for Bu Rec, including earthwork and rock structures, canals, dams, siphons, bridges, laterals, and power plants and facilities. Pactola Dam was by far the largest contract the company had ever undertaken. Bu Rec regarded Adler as a competent and trustworthy contractor.

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5. Washington Bu Rec issued an invitation for bids on Pactola Dam August 26, 1952, with revised bid opening scheduled for September 30, 1952, at Rapid City, South Dakota. The invitation listed 70 items, all but three of them at unit prices. Contract award was required by November 29, 1952. The Instructions to Bidders, which accompanied the invitation but expressly was not to be incorporated in the contract, provided in part as follows:

> 12. Withdrawal of bids.—Bids may be withdrawn on written or telegraphic request received from bidders prior to the time fixed for opening. Negligence on the part of the bidder in preparing the bid confers no right for the withdrawal of the bid after it has been opened.
>
> * * * * *
>
> 17. Errors in bid.—Bidders or their authorized agents are expected to examine the maps, drawings, specifications, circulars, schedule, and all other instructions pertaining to the work, which will be open to their inspection. Failure to do so will be at the bidder's own risk, and he cannot secure relief on the plea of error in the bid. In case of error in the extension of prices the unit price will govern.

The bid bond which bidders were required to file conditioned the surety's liability on, *inter alia*, the contractor not withdrawing its bid within 60 days after bid opening.

6. Prior to bidding, Adler thoroughly explored the entire project site "during practically all the daylight hours" from August 28 through September 3 or 4, 1952. Some terrain was relatively smooth but much of it was quite rough, particularly the hills on each side of the damsite which provided Rock Sources A and B. He inspected the drill logs, the Government's test pits, and saw a number of drill cores which were largely in a state of disintegration because of their age (taken in 1939) and atmospheric exposure. Rock was in evidence in the shallow creek bottom. As a result of his detailed inspection Adler believed he would be awarded the contract because he was more familiar with it than his prospective competitors whose inspections had been more cursory and who (as he thought) had greater overhead expenses than Adler.

7. On September 30, 1952, bids were opened at Rapid City. Expressed in terms of extending the unit prices to es-

timated quantities, the 12 bids submitted ranged from Adler's low bid of $3,761,115 to a high bid of $6,959,509. Bu Rec's prebid cost estimate was $5,962,341, which was later reduced by $613,000 to $5,349,341 by reducing unit prices on four contract items. Thus, Adler's bid was $2,201,226 (37 percent) under the original Bu Rec prebid estimate, and was $1,117,361 (23 percent) under the second low bid of $4,878,476, while it was $2,269,203 (38 percent) under the average of the 11 other bids submitted.

8. Three Government representatives acted as a Board for opening and examining all bids on September 30, 1952. In its written report dated October 1, 1952, the Board stated in part as follows:

> An examination of the low bid shows prices below the Engineer's Estimate in practically all items from Item No. 1 through Item No. 42. Particularly drastic reductions are evident in Items 10 through 16. Totals of the amounts in those items produce a reduction of about 30 percent below the Engineer's Estimate, which comprises the bulk of the difference between the low bid and the Engineer's Estimate. The second low bid, that of the Guy F. Atkinson Company, shows not so drastic reduction in Items 10 through 16, with a considerable increase in price for Item No. 2. The low bidder's prices for Items 13 through 16, excavation in rock sources "A" and "B", are of particular concern. Almost certainly the low bidder would have to operate at considerable loss in the performance of that work at the bid prices. Compensating increases are not found in other bid items. A small price reduction is found in the low bidder's drilling and grouting items. It is known that his prices probably are based on quotations from a former Bureau driller, now engaged in private work, who is thoroughly familiar from past work at the site, with problems of drilling and water testing the foundations there.
>
> It would appear that the total schedule amount shown by the second low bidder approaches the minimum which could be expected from any contractor who expected to make a profit from the work.
>
> * * * * *
>
> *Recommendation Regarding Award.* It is felt by the members of this Board that the low bidder could not complete the work at his bid prices without considerable strain on his financial resources. However, he is known

> as a conscientious and skillful contractor, and unquestionably would prosecute the work vigorously and in full compliance with the terms of the specifications. It is therefore recommended that award be made to the Adler Construction Company of Loveland, Colorado, on its low bid of $3,761,115.00, provided that the company has adequate financial resources and provided that the bonding company furnishing the performance bond is well informed concerning the prices bid in comparison with our estimate and with other low bids.

Because of the disparity in Adler's bid, Bu Rec's legal counsel advised the contracting officer to ask Adler to confirm his bid, but this was not done.

9. Adler first learned of the sharp disparity in his bid by a telephone call from his employee at the Rapid City bid opening in the afternoon of September 30, 1952. Adler had been preoccupied with a time-consuming trial of a lawsuit against his company in Colorado since September 25 which had precluded closer attention to the preparation, submission, and opening of his bid on the Pactola Dam contract. Upon learning of the bid disparity he was shocked, and suspected a grave error, but was unable to confer with Bu Rec representatives concerning it until October 7, 1952, when a one-day adjournment in his trial involvement provided him with his first opportunity to discuss it at Bu Rec offices in Denver.

10. As reflected by a Government memorandum of the October 7, 1952 conference between Adler and Bu Rec officials with respect to the obvious disparity in his bid, Adler informed the conferees that his surety refused to issue a performance and payment bond because of doubts about his low bid, and that because of the pressures of his trial then in process he had not yet had an opportunity to review his bid, as to which "he may have made a mistake." Bu Rec officials emphasized the necessity to start performance as soon as possible and invited Adler to request in writing the Chief Engineer to delay contract award for a reasonable period to give Adler time to check his bid figures. Adler was advised by Bu Rec representatives to submit his bid sheets with a covering explanation of whatever errors he detected, which submission would then be forwarded to the Comptroller Gen-

eral for decision as to whether the circumstances justified a correction of his bid. On October 7, 1952, following the conference of that day, Adler wrote to the Chief Engineer requesting until October 16 to check his bid for errors and asking that the contract award be deferred until then. He expressed ignorance of the reasons for the wide difference between his bid and those of the next two bidders, and suspected errors in his bid. On October 11, 1952, Adler received a letter dated October 10 from the Chief Engineer to the effect that "We will withhold making the award a reasonable length of time", recognizing Adler's inability to avoid his current trial involvement, suggesting a conference with Adler and his surety at the earliest practicable time, and emphasizing the need to start the project as soon as possible.

11. The trial which had preoccupied Adler, since its commencement September 25, 1952, concluded on Saturday, October 11, 1952. On October 13, Adler advised Bu Rec by telephone that he had located some serious errors in his bid, one of which was in the amount of over $300,000, and requested a meeting with the Chief Engineer, Mr. McClellan, who was also the contracting officer, to discuss the errors and ensuing procedures. Later that day Adler was informed that a meeting would be held the following day with the contracting officer, as requested. A contemporaneous Government memorandum, possibly more accurate than Adler's recollection,[1] reflects that Adler was informed by telephone on the morning of October 14 from Bu Rec's Assistant Chief Construction Engineer that, despite Adler's objections, the contracting officer was going to award the contract that day, which would not interfere with Adler's right to apply for a correction of his bid. However, the contracting officer agreed to withhold the award until Adler came in for a conference that afternoon. Adler arrived at the scheduled conference armed with his bid estimate worksheets and details as to arithmetical errors in six principal items, totaling $581,505. He also brought a letter requesting that his bid be rejected, or accepted with corrections, and that contract award be deferred. At the conference Adler explained the errors to the Bu Rec representatives who were present, attributed them to

[1] The conflicts between the two versions are not momentous.

his trial preoccupation since September 25, and stated that both his bank financing and performance bonding were in jeopardy because of his low bid. He was advised by the conferees to submit in affidavit form information as to the errors and how and why they were occasioned, and they would thereupon be transmitted to the Comptroller General for advice as to bid revision, award to the next low bidder, or contract readvertising. Adler was told that "the contractor's allegation of error would be the sole item for consideration by the GAO and that the contracting officer would not be in a position to make any recommendations".

12. During the conference of October 14, 1952, referred to in the preceding finding, Adler was purportedly shocked upon being informed that the contract had been awarded to him. A telegram notifying him of the award was stamped as being dispatched from Bu Rec at 3:49 p.m., on that day and received at Adler's company headquarters in Loveland, Colorado, at 5 p.m., the same day, although Adler denies having been informed during the meeting that he had been awarded the contract, and avers that he was not aware of it until he arrived at his Loveland headquarters following the meeting. While the dispute is immaterial, the version of the facts presented here is based on a contemporaneous Bu Rec memorandum of the meeting and is preferred to Adler's recollection, even though none of the Bu Rec representatives who attended the meeting testified at the trial. The resolution of the facts on this point is no reflection on Mr. Adler's veracity, but merely a preference for a written record of the event over fallible human memory.

13. Whatever inclination Adler may have had on October 14, 1952, to refuse to perform the contract awarded to him that day unless the errors in his bid were corrected was necessarily affected by the awareness that a refusal to perform could have caused cancellation of his bid bond of $367,000 which would, in turn, have jeopardized Adler's financial condition and deprived him of working capital both for the contract in suit and to finish other contracts which were then nearing completion.

14. On October 15, 1952, the contracting officer confirmed by telegram to plaintiff that any correction in plaintiff's bid

would have to be effectuated by the Comptroller General because the contracting officer lacked such authority, and emphasized the importance that the request be made without delay because of the ten-day period [2] permitted by the contract for its execution and furnishing of performance and payment bonds. Failure to execute these forms was technical ground for forfeiture of the bid bond.

15. In a sworn statement dated October 18, 1952, Adler submitted to the contracting officer on October 20 a claim of bid errors totaling $621,505, in which he described the errors in his bid on each of seven contract items and enclosed a copy of those of his bid worksheets which were relevant to the claimed errors. These errors may be summarized as follows by contract item numbers:

No. 1, diversion and care of stream, etc. Bid at $45,000 instead of $75,000 due to error in transposing figure from worksheet to bid.

No. 2, excavation of 420,000 c.y. of overburden in open cut. Bid at $147,000 instead of $224,540 due to failure to include in computation the factor of $77,540 for equipment charges as shown on worksheet but not inserted in the total or transferred to bid.

No. 5, excavation of 1985 c.y. all classes. Bid at $45,655 instead of $63,520 due to failure to include in computation the factor of $17,865 for equipment charges as shown on worksheet but not inserted in the total or transferred to bid.

No. 9, excavation of 220,000 c.y. stripping in borrow pits. Bid at $41,800 instead of $51,800 due to simple error in addition on bid worksheet.

Nos. 10 and 11, collectively. Common excavation of 2,000,000 c.y. in upstream borrow area and transportation to embankments. Bid at $520,000 instead of $880,100 due to failure to include in computation the factors of $311,100 for equipment charges and $49,000 for "margin" as shown on worksheet but not inserted in the total or transferred to bid.

No. 12, common excavation of 700,000 c.y. in downstream borrow area and transportation to embankment. Bid at $175,000 instead of $301,000 due to same oversight as in Items Nos. 10 and 11, on which the computation was based.

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[2] The ten-day period commenced to run October 9, 1952, when the contract and bond forms had been sent to Adler for execution.

These errors were not individually apparent on the face of Adler's bid, but were readily apparent in Adler's bid worksheets, which Bu Rec did not have until later, although the disparity between Adler's bid and the others was enough to excite Bu Rec's concern, as indicated in findings 8 and 16.

The letter of October 18, 1952, concluded with Adler's request that he be excused from executing the contract according to the original bid, or that the bid be adjusted to eliminate the errors.

16. On October 31, 1952, the contracting officer wrote a memorandum to the Commissioner of Washington Bu Rec presenting in full detail the circumstances of the plaintiff's erroneous bid, recommending that the Comptroller General be asked for a decision whether the contractor would be entitled to relief by correcting the bid errors. If so, the contracting officer recommended "that correction be allowed by appropriate reformation of the contract". The contracting officer expressed the opinion that reformation would be "in accordance with previous decisions of the Comptroller General that the bid can be corrected if the amount of the intended bid can be established". He advised that readvertisement of the contract would not only result in much higher costs to the Government than if Adler's errors were corrected, but would also delay completion of the contract for a full season.

17. In the meantime the bid of Guy F. Atkinson Co., the second lowest bidder, contained an acceptance period limitation of 30 days which expired October 30, 1952.

18. On November 3, 1952, the Administrative Assistant to the Secretary of the Interior submitted the contracting officer's recommendation of October 31, 1952 (finding 16, *supra*) to the Comptroller General for a decision, with the following comment:

> * * * The Chief Engineer [i.e., contracting officer] recommends that, if you conclude that errors entitling the contractor to relief have been made, the contract be reformed accordingly. The Commissioner of Reclamation and I concur in this recommendation as being in the best interest of the Government.

19. Adler was not aware of the communications referred

to in findings 16 and 18, *supra*, until they were produced in the course of discovery proceedings in the instant litigation.

20. On November 14, 1952, Adler was advised by telephone from Bu Rec that the Comptroller General had made a decision with respect to his request for bid reformation. The following Monday morning, November 17, 1952, Adler visited Bu Rec in Denver, unaccompanied by counsel. He was informed by Bu Rec representatives that they had learned that a decision had been made by the Comptroller General on November 14, 1952, to the effect that the contract could be amended to correct the errors. Neither Adler nor the Denver office of Bu Rec had the text of the Comptroller General's decision, and the extent of Bu Rec's knowledge of its contents is not disclosed. Nor is it known whether Washington Bu Rec had the text of the decision at that time. A protracted conference with Adler was held all during November 17, 1952, at Bu Rec in which the several errors in Adler's bid were discussed at length. Bu Rec was apparently concerned that Adler's corrected prices for certain of the erring items was more than the Government's prebid estimate for the same items or than the bids of several other contractors for certain of the items, which led the Bu Rec representatives at the conference into approving increases in Adler's defective bid which in the aggregate were $136,240 less than Adler's claim. The bid invitation itself had provided that "no bid shall be considered for only part of the schedule". In many other items Adler's bid was far lower than other bidders, and this was true in the aggregate as well. See finding 7, *supra*. Upon Adler's complaint that Bu Rec's proposal failed to fully rectify what were clearly mistakes in the bid, Bu Rec's principal negotiator, a Mr. Bloodgood, commented in effect "that's all we can pay". Adler was told that no further delay would be allowed and he would have to sign the contract documents immediately and a notice to proceed must be issued that day. Towards the end of the November 17, 1952 conference an Amendatory Agreement was prepared by Bu Rec and given to Adler to sign. The agreement had not at the time been signed by Bu Rec. Adler testified that he signed it without knowing its contents or being permitted to read it, but there is no credible evidence

that Adler demanded an opportunity to read it or was prevented from reading it before signing it, except that the workday was purportedly drawing to a close and the contracting officer was anxious to terminate the conference. Adler was, however, aware that the Bu Rec representatives had reduced his claim of errors by $136,240 and must have been aware of the reasons given for the reduction even though he might not have agreed with them. Adler testified that he signed the Amendatory Agreement under economic duress at a time when he feared that, if he did not sign it together with the contract itself and the supporting performance and payment bonds, his bid bond of $376,111 would be in danger of forfeiture, but by November 17, 1952, the ten-day period for executing the contract on pain of bid bond forfeiture had long since expired and no such action had been taken or threatened by the bonding company so far as the record intimates. The facts in this finding are predicated in part on Adler's testimony and in part on documentary evidence. No testimony was offered by Bu Rec officials attending the November 17 conference.

21. The Amendatory Agreement signed by the parties on November 17, 1952, which Adler contends as stated above is void because of unlawful duress and lack of consideration, provided in part as follows:

> WHEREAS, the Comptroller General of the United States, upon the basis of evidence furnished by the Contractor, has ruled (copy of decision attached hereto as Exhibit A) that there were mistakes in the Contractor's bid, and that since the bid, if corrected in the full amount of all mistakes, would still be the low bid, it can be reformed by the contracting officer to correct said errors; and
>
> WHEREAS, the contracting officer is willing to agree to reformation and to proceed with the contract only on the basis that where correction of the mistake or mistakes as to any item results in a unit or lump sum price in excess of a conservative and fully justifiable price, the unit or lump sum price as reformed will not exceed said conservative and fully justifiable price, which principle is acceptable to the Contractor; and
>
> WHEREAS, reformation of the contract as hereinafter provided is hereby determined to be advantageous to the Government both because it will permit immediate

commencement of work on an urgently needed project to supply water to the Rapid City Air Force Base, and because the contract as reformed will result in a cost to the Government of $1,715,961 lower than the Government's original cost estimate and $632,096.50 lower than the next low bid.

NOW, THEREFORE, the parties hereto mutually agree as follows:

1. The respective unit prices for Items 1, 2, 5, 9, 10, 11, and 12 are hereby deleted from the schedule of Specifications No. DC–3783 and the contract is hereby reformed by substitution of unit and extended prices for said items as follows:

Item No.	*Work or material*	*Quantity and price*	*Amount*
1.....	Diversion and care of stream during construction & unwatering foundations.	For the lump sum of ____ Sixty thousand (words) 00/100 dollars	$60,000.00
2.....	Excavation, overburden, in open cut	420,000 cu. yds., at Fifty-three cents (words) ($0.53) per cu. yd.	222,600.00
5.....	Excavation, all classes, in tunnel and gate chamber	1,985 cu. yds., at Thirty-two dollars (words) ($32.00) per cu. yd.	63,520.00
9.....	Excavation, stripping borrow pits	220,000 cu. yds., at Twenty-three cents (words) ($0.23) per cu. yd.	50,600.00
10.....	Excavation, common, in upstream borrow area & transportation to embankments, first 1,000,000 cubic yards	1,000,000 cu. yds., at Forty-two cents (words) ($0.42 per cu. yd.	420,000.00
11.....	Excavation, common, in upstream borrow area and transportation to embankments, over 1,000,000 cubic yards	1,000,000 cu. yds., at Thirty-seven cents (words) ($0.37) per cu. yd.	370,000.00
12.....	Excavation, common, in downstream borrow area and transportation to embankments	700,000 cu. yds., at Thirty-nine cents (words) ($0.39) per cu. yd.	273,000.00

The increases in unit and lump sum prices as above provided result in an increase of $185,265 in the total amount of the contract based upon the estimated quantities stated in the schedule.

2. In consideration of the Government's waiving its right to rescind the contract, the Contractor hereby accepts the foregoing reformed unit and lump sum prices in full satisfaction of all of its rights arising out of or in any way connected with mistakes in its bid, notwithstanding the fact that the unit and lump sum prices

> stated in Article 1 hereof in several cases do not reflect increases equal to the full amount of the errors claimed by the Contractor and found by the Comptroller General.

The amounts set forth in the foregoing excerpts from the Amendatory Agreement may be compared with the summary in finding 15, *supra*, which recites Adler's bid for each disputed item and his correction request. Unit price references are omitted as unnecessary.

22. Although the Amendatory Agreement of November 17, 1952, refers in the "whereas" clauses to the parties having "heretofore entered into" a contract for Pactola Dam, and to a copy of the Comptroller General's decision as being attached as Exhibit A, at the time the Amendatory Agreement was signed on November 17, 1952, the parties did not have possession of the Comptroller General's decision, and Adler did not sign and deliver the contract itself until immediately following the signing of the Amendatory Agreement, but did so prior to leaving the conference. Adler did not receive a copy of the Amendatory Agreement of November 17 until November 28, 1952, but there is no evidence that he demanded it earlier. Also, while the concluding "whereas" clause of the Amendatory Agreement refers to the fact that the revised contract price was lower than the next lower bid by $632,096.50, in fact the next lower bid had expired by its own terms prior to October 31, 1952, and hence was no longer available. See finding 17, *supra*.

23. On or about November 28, 1952, Adler received for the first time a copy of the November 14, 1952, decision by the Comptroller General which held in part as follows:

> On the basis of the facts and evidence of record there appears no doubt that errors were made in the bid. Furthermore, the evidence reasonably established that except for the errors the prices for the various items would have been as alleged. The bid of Adler Construction Company, if it be corrected, is still approximately $500,000 lower than the next-lowest bid received.
>
> It is reported that the project involved was recently approved by Congress for immediate construction in order to make available a much needed water supply for the Rapid City Air Force Base of the Strategic Air

Command, and that the work is of a highly urgent nature. It is further reported that any substantial delay in the matter will make it impossible to perform the necessary initial construction work before the onset of winter weather which would result in a full season's delay in the ultimate date when the water can be furnished to the Rapid City Air Force Base and that, therefore, readvertisement of the work is not considered to be in the best interests of the Government.

Under all the circumstances, this Office will not be required to object to the correction of the bid of the Adler Construction Company on items 1, 2, 5, 9, 10, 11 and 12 to the prices hereinbefore set forth and entering into a formal contract with the company on that basis.

The Comptroller General totaled the bid errors to $621,465 instead of Adler's claim of $621,505, by rounding off to the nearest cent the unit price in several of the items. In its requested findings to this court the plaintiff concedes the slight reduction in the claim by the Comptroller General to be entirely justified.

24. Depending on the construction given to certain cost factors listed in plaintiff's bid worksheets, at the time he executed the Amendatory Agreement on November 17, 1952, increasing his bid by $485,265 to correct errors, Adler could have expected to earn a profit on the contract of $557,696 (according to the Government's interpretation) or $271,083 (according to Adler's interpretation), assuming that the cost estimates in Adler's bid worksheets as corrected were to be experienced in actual performance. All but $10,086 of the difference between these conflicting profit figures depends on the interpretation to be given the plaintiff's bid worksheets as to whether figures added at the end of cost subtotals for Direct Salaries and Continency for Labor Increase were included in the Margin factor supplied separately in each of the contract items. While the purpose of this finding is to reflect in part the influences which were present when Adler executed the Amendatory Agreement on November 17, 1952, it is to be borne in mind that at the same time his bid as corrected was in remaining respects so substantially lower than the nearest competitor's ($632,096.50 difference) and than the Government estimate ($1,715,961 difference) as to

cause a reasonable man to suspect further errors less readily detectable than the seven obvious errors he had already urged.

25. In a letter dated July 5, 1960, from the Under Secretary of the Department of the Interior to the Chairman of the United States Senate Committee on the Judiciary, written in response to the latter's request for the Department's views on the then pending private relief bill S. 3199 for the relief of the Adler Construction Company, in the course of recommending relief for one of the three claims (and recommending against the other two) then being made by the contractor which related to rectifying its mistake in bid, the Under Secretary made the following statements of fact and opinion which bear on the contractor's situation on November 17, 1952, when the Amendatory Agreement was presented to Adler:

> It is believed that the Government has technical legal defenses (i.e., statute of limitations and failure to reserve the claim in the contractor's release on the contract) to the contractor's claim which would preclude his recovery in the courts. And, apart from the technical defenses, it is doubtful that on the merits the contractor could successfully establish either that duress was involved in securing his consent to the amendatory agreement, or that the amendatory agreement was invalid for lack of consideration. However, the Congress, in certain hardship situations, has granted legislative relief where the applicant does not have a legally enforceable claim but has a claim presenting strong moral and equitable considerations. Considered in this light we are of the opinion that Adler's claim for relief insofar as claim (a) is concerned, has such compelling considerations of fairness that congressional relief would be warranted.
>
> In reaching the above conclusion, a number of considerations are involved. In the first place, Adler was placed in an exceedingly precarious position by the fact that his bid was so very low in comparison with other bids and the engineer's estimate as to raise doubt as to his ability to perform the contract without ruinous losses. This situation was complicated by the fact that he was involved at the time in litigation from which he was

unable to free himself for a sufficient period to give full consideration to the problem. His situation was further aggravated by the fact that there were indications that the bonding company that had furnished his bid bond would not furnish a performance bond to support the contract, and in such event, his bid bond in the amount of $376,000 would have been subject to forfeit. This would have had very serious consequences, in all probability resulting in Adler's complete financial ruin. Additionally, the Government's urgent need to get the work under way impelled it to make the rather precipitous award of contract, notwithstanding the fact that Adler had given verbal notice of serious errors in his bid. Although the award was not made with any intention to prejudice Adler's position, it is obvious that the Government's necessity dictated a course of action which placed him in a most difficult position.

With regard to the negotiations as a result of which Adler was induced to accept the amendatory agreement, personnel who were present at the meeting recall that Adler appeared in response to a telephone call, and was unaccompanied by legal counsel or associates. He offered no serious opposition to the Government's proposal and accepted the proposal precisely as it was made. At the time these negotiations took place, it seemed to the Government personnel involved a proper course of action in the discharge of their responsibilities. However, viewed in retrospect, it is considered that they were overly zealous in their desire to safeguard the Government's financial interests, and that the contractor, subject to such pressures as he was under at the time, had or at least thought that he had almost no alternative to accepting a proposition that was seriously adverse to his interests and one that it is now felt, in good conscience, the Government should never have made.

Even with Adler's bid corrected in the full amount of the error found by the Comptroller General, it would still be some $600,000 below the next low bid and approximately $1,100,000, or 25 percent below the revised Government estimate. It is apparent that even with the

error as allowed by the Comptroller General, the Government had the advantage of an exceedingly low bid. As a result of performing the contract at the contract price, including the prices in the amendatory agreement, the contractor suffered ruinous financial losses, and he has been forced to sell much of his construction equipment. Since completing the Pactola Dam job, he has been unable to secure bonds covering jobs of any substantial volume of work, and has been confined largely to subcontracting small jobs from other contractors.

In view of the foregoing, it is the opinion of the contracting officer, in which this Department concurs, that claim (a) submitted by the Adler Construction Co. in S. 3199 contains such elements of equity and fairness that relief legislation to the extent of $136,532.86 is warranted.

26. Notice to proceed was issued on November 17, 1952, thus establishing June 25, 1955 as the original contract completion date (950 days). Time for performance was ultimately extended to August 15, 1956. No liquidated damages were assessed, although the prospect existed until late in contract performance (see finding 61, *infra*).

27. The contract contained the following standard Changed Conditions clause:

> Article 4. *Changed conditions.*—Should the contractor encounter, or the Government discover, during the progress of the work subsurface and/or latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, or unknown conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the plans and specifications, the attention of the contracting officer shall be called immediately to such conditions before they are disturbed. The contracting officer shall thereupon promptly investigate the conditions, and if he finds that they do so materially differ the contract shall, with the written approval of the head of the department or his duly authorized representative, be modified to provide for any increase or decrease of cost and/or difference in time resulting from such conditions.

28. As the work under the project progressed, the plaintiff encountered subsurface or latent conditions at the site of the main dam foundation materially different from those shown in the drawings and specifications which made excavation and refill work much more difficult and costly. Defendant became aware of the conditions as they were uncovered by plaintiff. The conditions to be described in subsequent findings are confined to the foundation for the main dam and, unless otherwise specified, do not relate to other parts of the project.

29. The major claim of the plaintiff is that foundation surfaces acceptable to the Government under the main damsite were reached at substantially greater excavated depths below original ground surface than the contractor was led to anticipate from his inspection of the site and examination of contract drawings, specifications, and drill logs, and that the foundation ultimately excavated down to "suitable material" as determined by the Government was much rougher and more irregular than the drawings, specifications and drill logs portrayed, or than plaintiff's thorough prebid-site inspection inferred. It is plaintiff's contention that the conditions encountered were not only materially different "from those shown on the drawings or indicated in the specifications" (in the language of the Changed Conditions article, *supra*), but that they also greatly increased his costs by reducing operating efficiencies, requiring additional equipment, prolonging the performance period, and requiring unplanned performance under severe winter weather conditions, and that the admitted 261 percent overrun of excavation (and corresponding additional fill) paid for at contract unit prices did not properly reflect or compensate for the extreme difficulties and added costs which the subsurface conditions imposed on performance. In order to place the problem in proper perspective it is first necessary to examine closely the relevant specifications, drawings and drill logs to determine what the plaintiff (and other bidders) could have reasonably anticipated in the way of subsurface conditions to be encountered in the course of excavating foundations for the main damsite.

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30. Article 2 of the contract, entitled Specifications and Drawings, provided in part as follows:

> ** * Anything mentioned in the specifications and not shown on the drawings, or shown on the drawings and not mentioned in the specifications, shall be of like effect as if shown or mentioned in both. In case of difference between drawings and specifications, the specifications shall govern. In any case of discrepancy in the figures, drawings, or specifications, the matter shall be immediately submitted to the contracting officer, without whose decision said discrepancy shall not be adjusted by the contractor, save only at his own risk and expense. * * *

31. Paragraph 16 of the Specifications requires that the dam be constructed "in accordance with these specifications and the drawings listed in Paragraph 128 hereof, * * *." Paragraph 128 includes Drawing No. 494–D–39, "General Plan and Sections", which in addition to a general plan drawing of the complete project, contains, *inter alia*, various detail and section drawings entitled "dam-maximum section," "profile on center line of cutoff trench-dam", "concrete cutoff wall", and "concrete grout cap", to name a few project features that are relevant to our present inquiry, plus miscellaneous other data as to elevations, camber, reservoir, material legends, dimensional scales, etc. Certain errors and ambiguities in Drawing No. 494–D–39 (hereinafter shortened to Drawing 39), and inconsistencies between the drawing and specifications, constitute the principal basis for plaintiff's contentions as to Changed Conditions.

32. Drawing 39 contains a profile section drawing entitled "dam-maximum section". It purports to show a longitudinal cross-section of the main dam perpendicular to the dam axis, meaning a vertical endwise slice of the dam from its upstream toe to its downstream toe. The witnesses were in marked disagreement as to whether the drawing was designed to provide an actual or merely a theoretical cross-sectional location. If the former, they disagreed as to the location depicted. If the latter, the drawing is not labeled as theoretical and the witnesses' description were contradictory and confusing. The author of the drawing, a Government employee, was not called as a witness to explain what he intended to portray by

the drawing. The drawing is perhaps an adequate diagram as to the relative arrangement of the three "zones" of fill material,[3] the slope angles, reservoir storage levels, and a few dimensions and miscellaneous instructions paraphrased from the specifications, but in other important respects it is misleading, erroneous, self-contradictory, in conflict with another detail drawing contained in Drawing No. 39, and in conflict with Specification 17. A dimension of 220′ plus or minus is specified for the distance from the crest of the dam to the original ground surface, but this distance is about 214.2′ when calculated by use of the 1″ to 100′ scale beneath the drawing. Horizontal lines at the bottom of the drawing depict the original ground surface and, below that, the assumed rock surface, which is shown to correspond with the bottom of the cutoff trench,[4] as well as an intermediate undesignated line (whether rock or otherwise is not specifically stated) upon which all of the dam embankment rests except that part above the cutoff trench. No dimensions are provided as to the space between these surface and subsurface lines, but the maximum distance scales at 16′ between the original ground surface and the bottom of the cutoff trench, the latter being the lowest foundation point. The edges of the cutoff trench are shown to be about 5′ lower than the contiguous foundation line. It cannot be determined from examining the drawing whether the undimensioned spaces separating the surface and subsurface lines are supposed to be actual or theoretical (i.e., diagrammatic) average, minimum, or maximum,

[3] Zone 1 material is compacted silt, clay, sand and gravel. Zone 2 material is compacted rock fines. Zone 3 material is layered rock fill. Basically, the Zone 2 material is sandwiched schematically between a Zone 1 core and a Zone 3 exterior to form the earth dam.

[4] In layman's terms, the cutoff trench is a fairly shallow trench of 150′ designed maximum width which is cut out of the dam foundation, although in this case the considerable irregularity of the rock in the cutoff trench area obviated the need for the excavation of an actual trench. In the General Plan View in Drawing 39, the cutoff trench viewed from above is roughly arcuate in shape (i.e., bow-shaped, banana-shaped, or boomerang-shaped, as the eye persuades), spanning the upstream side of the dam axis and dwindling in width as it ties in to the ascending abutments on either end of the dam axis. A concrete cutoff wall, in which are embedded at intervals a number of hollow grout pipes which extend downward some distance into the underlying rock, is constructed through the center length of the cutoff trench. Grout (concrete of a soupy consistency) is forced under pressure through the hollow grout pipes so as to fill and solidify subterranean rock fissures, the object being to create a solid barrier to the permeation of water which, if not blocked, might weaken the dam.

or any more than a design representation of the obvious, i.e., that the original ground surface lies somewhere above the assumed rock surface throughout the main damsite. Witnesses for both parties who offered their opinions as to the meaning of the subsurface facts depicted in the drawing demonstrated only their uncertainty and confusion. It is concluded that the "dam-maximum section" drawing is part stylized fiction and part fact, that the specified 220′ elevation from ground to crest conflicts with the scaled dimension, that a reasonable bidder would not necessarily detect this discrepancy, and that the plaintiff would have been entitled to assume that the subsurface elevations portrayed were maximum estimates.

33. Drawing 39 also contains a detail drawing entitled "profile on center line of cutoff trench-dam", which has on either side a 1″ to 100′ scale from which can be roughly computed the respective elevations of the profile lines representing original ground surface, assumed rock surface, bottom of cutoff trench, etc. The scale and details are too small for an accurate calculation, but the plaintiff calculated that at 13 equidistant points from end to end of the center line of the cutoff trench the distance from the original ground surface to the bottom of the cutoff trench is shown to vary from 3′ to 13′ across the valley, or an average of 6.3′. The Government computed this average to be 7.5′. Either version of the average, or the plaintiff's finding of a 13′ maximum distance, is substantially less than the 16′ difference shown in the "dam-maximum section" drawing described in finding 31, a discrepancy that can only be reconciled either by drafting errors or by the supposition that the 16′ difference shown in the latter drawing presumably occurred at some point in the cutoff trench other than the center line shown in the drawing entitled "profile on center line of cutoff trench-dam". It could also be reconciled by the defendant's contention that the drawing was merely theoretical and not intended to reflect actual conditions.

34. Article 2 of the contract (finding 30, *supra*) directs that in the case of difference between the drawings and the specifications the latter will govern. Paragraph 17 of the Specifications provides that the dam "will have a maximum

height of approximately 230 feet above the lowest foundation". Accordingly, it was reasonable for the plaintiff to conclude in preparing his bid that the maximum amount of excavation he would encounter at the main damsite would be approximately 10′, i.e., the difference between the 230′ stated by paragraph 17 of the Specifications to be the approximate height of the dam above the lowest foundation (clearly the bottom of the cutoff trench), less the 220′ dimension specified in the dam-maximum section drawing to be the distance between the crest of the dam and the original ground surface.[5] The plaintiff would not be charged with knowledge that the latter dimension was in possible error or charged with responsibility to scale the various distances shown in the drawings in order to establish a correct correlation with the Specifications, since the meaning of the drawings in vital respects was ambiguous and indefinite, and these deficiencies would not be immediately apparent to bidders.

35. In addition to the drawings and specifications discussed in findings 31 through 34, the plaintiff and other bidders had available for examination the logs reflecting the analysis of some 25 test cores most of which had been drilled in 1939 in order to ascertain subsurface conditions at the damsite. Elsewhere in the project outside the main damsite other holes and test pits were drilled. Apparently an unknown number of drill logs were not available for examination. As admitted by Government witnesses, there were not enough cores drilled in such a large area as the dam foundation (approximately 22 football fields in size), nor in the proper locations, to provide an adequate estimate of the amount of anticipated excavation, although the Government's prebid estimates as to excavation quantities (findings 38 and 39) were based primarily on conditions shown by the log reports, as was the Government's depiction of the "assumed rock surface" lines on relevant contract drawings. Bu Rec did not approve its chief designing engineer's recommendation in 1952 to drill additional cores, which if done may have permitted more accurate estimates. Estimation of excavation quantities from drill log data is inherently inaccurate. Nor

[5] A preliminary geologic report prepared by Bu Rec in 1951 reports that the overburden in the valley floor at the main damsite averages about 10′.

did the logs provide a basis for determining accurately either the depth of excavation before reaching suitable foundation conditions,[6] or for determining the degree of roughness in the underlying rock which plaintiff would encounter in the course of excavating the damsite, particularly in the cutoff trench area of the main dam foundation where most of the difficulty was encountered. Typically the logs reported the various stratification of soils and rocks according to types and depths shown in the contents of each core drill, but from the description given it could not be accurately determined what substances would have to be removed to what depths in reaching suitable foundation conditions, or at what point suitable foundation conditions would be reached, even if the cores had been sufficiently numerous and adjacent to provide a readable and reliable pattern.[7] The cores themselves were available for examination, but they were not complete and those that existed were badly weathered and decomposed in the course of storage conditions over a protracted period, so an examination of them would not have added substantially to the information available from the log reports. Proof of the inadequacies of the log reports as a basis for prediction of subsurface conditions or depths of necessary excavation is evidenced not only by the testimony of Government witnesses but also by the 261 percent variance in the Government's prebid estimates of quantities of excavation at the damsite. In resisting plaintiff's allegation that changed conditions were encountered in excavating for the main dam foundation than those shown in the contract documents, the Government places heavy reliance on the drill logs as constituting a clear warning to bidders of subsurface conditions, excavation depths, etc. It is not deemed necessary to analyse in this report the details of the individual drill logs, as defendant has partially done, for the testimony of witnesses for both parties was overwhelmingly to the effect that there were not nearly enough cores drilled to be helpful, and that

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[6] Not necessarily rock, since the main dam embankment was designed to rest on suitable material other than rock outside of the cutoff trench, and the drill logs could not be interpreted to disclose at what level such suitable material would be encountered.

[7] Drill logs available to bidders did not advise as to depth of overburden or top of rock, although Government data not available to plaintiff contained this data.

very little could be interpreted from the logs as a forecast of excavation quantities, ultimate foundation elevations, regularity or roughness of the ultimate foundation, etc. The unreliability of the drill logs to predict depth of excavation is demonstrated in Defendant's Exhibit 58, which plots each of the drill holes in the main damsite and as to each reports the depth of estimated overburden (taken from a Bu Rec study made in July 1951) and the actual depth of excavation which was experienced. In many instances the estimates were at sharp variance with the experienced depths.

36. Paragraph 55(b) of the Specifications provided that excavation of the dam foundations shall be—

> * * * to a sufficient depth to remove all materials not suitable for the foundation of the dam * * *, as determined by the contracting officer. The unsuitable materials to be removed shall include all topsoil, rubbish, vegetable matter of every kind including roots, and all other perishable or objectionable materials that might interfere with the proper bonding of the embankments with the foundations, or the proper compaction of the materials in the embankments, or that may be otherwise objectionable. All loose, soft, or disintegrated rock shall be removed to the extent directed by the contracting officer from the abutments of the dam * * * embankments. * * * Cut-off trenches, as shown in the drawings, shall be excavated to suitable rock foundations for the dam * * * embankments. * * *.

The suitability of the foundation surfaces depended on the nature of the fill material to be deposited in the particular areas of the dam foundation. For example, in those areas of the excavated foundation surfaces on which Zone 1 material was to be deposited and compacted, it was necessary to remove all overburden down to clean rock surfaces without sands, gravel, silt, muck, ponds of water, or compressible material, particularly in the cutoff trench area. These standards were somewhat relaxed outside of the cutoff trench area so as to permit small pockets of silt and sands under Zone 1 fill that were not substantially different from Zone 1 material.

37. Neither the specifications nor drawings led bidders to expect to encounter subsurface foundation rock of such extreme irregularity as the plaintiff encountered and as a

number of photographs in the record vividly portray, as well as cross-sectional excavation drawings. Drawing 39 may be fairly appraised as representing a relatively smooth "assumed rock surface" in the area of the cutoff trench, and a relatively smooth and regular foundation elsewhere under the main dam. Had Bu Rec expected to run into such a chaotic rockscape it could have depicted the condition in the drawings by conventional symbols or words of warning. However, given the inadequate number of drill holes on which to base such a prediction, and the inherent difficulty in interpreting drill logs in an even more numerous pattern in terms of excavation quantities and potential foundation problems of the type in question, neither Bu Rec nor plaintiff could have reasonably foreseen the actual conditions which clearly qualified as Changed Conditions under Article 4 of the contract.

38. Assuming the validity of the plaintiff's reliance on a Bu Rec representation drawn from the contract documents that plaintiff would encounter a maximum excavation at the damsite of approximately 10' to reach suitable foundation conditions (finding 34), the most telling proof of this representation being greatly exceeded in actual excavation experienced at the damsite is contained in a number of cross-section drawings which were maintained by Bu Rec for progress payment purposes and which reflected in great detail the actual excavation quantities and depths at periodic time intervals, as well as the roughness of the foundation terrain.* The plaintiff has relevantly reduced this voluminous data on the cross-section drawings to a convenient table as an appendage to its brief. This table reflects the best evidence of the following conclusions:

(a) The average depth of excavation below ground surface along the center line of the cutoff trench was 15.94'. This average is based on actual measurements taken at sixty-five 20' intervals along the center line, ranging from 5' to 48' in

* As plaintiff analyzes these drawings, while the data with respect to original ground surface and ultimate excavation elevations are ostensibly the most reliable evidence of those facts, the drawings provide only fragmentary records of monthly progress, even though progress payments for excavation were supposedly based on these drawings each month. The inconsistency is without explanation. Moreover, as to approximately 32 percent of the dam area the ultimate excavation lines are in pencil, indicating that they are not final.

individual excavation depths, and compares to the 6.3' and 7.5' averages estimated by plaintiff and defendant, respectively, based on scaling the dimension in question from the section drawing entitled "profile on center line of cutoff trench—dam" contained in contract Drawing 39 (finding 33).

(b) Upstream and downstream of the center line of the cutoff trench the average maximum depth of excavation in the main dam foundation was 24.71', as compared to the approximately 16' maximum depth shown on the section drawing entitled "Dam—Maximum Section" contained in contract Drawing 39 (finding 32), or the approximately 10' maximum excavation which plaintiff construed from the specifications and drawings as described in findings 32–34, *supra*. The maximum average excavation of 24.71' is based on maximum measurements taken throughout the main dam foundation area at 20' intervals along the center line of the cutoff trench, and at right angles to the said center line. These maximum measurements were not isolated pockets which were excavated to extreme depths, but were sizeable areas which averaged 435.56' in width and spread over sixty-nine 20' intervals perpendicular to the dam axis, and were quite representative of the entire main dam foundation area.

(c) The table also shows that roughness and irregularity in the foundation surface was characteristic, since it occurred in large patches averaging 315.8' in width upstream and downstream from the dam axis, according to measurements made at sixty-nine 20' intervals along the dam axis and perpendicular thereto. The roughness and irregularity of the foundation surface reflected by these statistics is necessarily a subjective interpretation based upon the surface irregularities shown in the voluminous cross-section excavation drawings. A study of these drawings does not necessarily yield *exact* verification of the plaintiff's statistical interpretation of the average width of the rough patches, but the drawings do indicate that a condition of extreme irregularity in foundation surfaces occurred over a substantial portion of the main dam foundation area, some individual patches being more pronounced in that respect than others.

39. In preparing the bid invitations Bu Rec estimated a total excavation of 132,955 cu. yd. of overburden under the

main damsite to reach suitable foundation conditions. This estimate was based on the removal of an average of 2' of overburden above elevation 4,450' (which presumably would be on the left and right abutments) and 5' below that elevation (which would presumably be the bottom of the dam generally), plus an average of 3' more for the cutoff trench area to get down to bedrock there as specifications required. This estimate contrasts with the representation in the drawings and specifications of a 10' maximum excavation below ground surface, at the lowest part of the foundation, as described in finding 34, *supra*, or the approximately 16' depth of the bottom of the cutoff trench shown in the dam—maximum section drawing which is part of contract Drawing 39. Plaintiff actually excavated a total of 347,946 cu. yd. for the main dam foundation, an increase of 214,991 cu. yd. or 261 percent over Bu Rec's precontract estimate of 132,955 cu. yd. Item 2 of the Schedule provided an estimate of 420,000 cu. yd. of overburden excavation in open cut which was for excavation at several locations in the project, including the main dam foundation. At the time of his bid, plaintiff did not know that Bu Rec had allocated 132,955 cu. yd. of excavation out of the total 420,000 cu. yd. to the main dam foundation, but from the contract drawings it was possible to make a rough allocation of the 420,000 cu. yd. to the various locations, including the main dam foundation. The overrun in material to refill the dam embankment which required extraction from borrow sources, transportation to and placement in the dam embankment, was 327,617 cu. yd. General Condition 4 of the contract advised that the quantities estimated in the Schedule were "approximations for comparing bids, and no claim shall be made against the Government for excess or deficiency therein, actual or relative. * * *."

40. (a) Certain conclusions may be reached as to the total overruns in excavation and fill in the entire project, including that for the main damsite,[9] expressed in terms of quantities as well as contract values.

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[9] Excavation and fill for the main dam represented 83 percent of the overall total.

(b) Thus, contract Schedule Items 2, 3, 4, 5 and 6,[10] which comprised generally open-cut excavation wherever it occurred for the dam and dikes, plus excavation for the tunnel, gate chamber, and access shaft, were estimated by Bu Rec prior to the contract invitations in the collective quantity of 753,840 cu. yd., but performed in the net quantity of 1,002,315.2 cu. yd., for a collective overrun of 248,475.2 cu. yd. (including in the computation an underrun of 19,515 cu. yd. for Schedule Item 3), or an increase of 24.8 percent.

(c) Contract Schedule Items 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24 and 25, which comprised generally the stripping and excavation of borrow areas and rock sources and transportation of the material to the dam and dike embankments, backfill, and deposit of rock and other fill on the several embankments, were estimated by Bu Rec prior to the contract invitations in the total quantity of 8,376,000 cu. yd., but performed in the net quantity of 8,696,421 cu. yd., for a net overrun of 320,421 cu. yd. (including in the computation underruns totaling 279,444 cu. yd. for Items 12, 13, 14, 18, 19, 24 and 25), or an increase of 3.7 percent.

(d) Expressing these net overruns in quantitative terms may not be a fair reflection in terms of the relative work involved for the contractor, since by way of illustration excavation of overburden (Item 2) was compensable by the contract at 35 cents per cu. yd., while rock excavation (Item 4) was compensable at $22 per cu. yd., so that 10 yards of rock excavation could not be compared to the same quantity of overburden excavation. Extrapolated to reflect the contract value of the additional excavation and fill throughout the project, the net overruns bore a contract price of $422,207.85 (i.e., $528,132.09 in overruns less $105,924.24 in underruns), which is 10 percent of the original contract price of $4,246,380.

These statistics, however, must be read with discrimination. By totaling net overruns throughout the project they fail to reflect the concentration of overruns in the main dam

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[10] The Schedule covered 70 items, all but three of which were to be paid at unit prices.

area itself as described in finding 38, which is the only area claimed by plaintiff to be responsible for his difficulties. Furthermore, the statistics of excavation quantities fail to reflect the severity of the conditions under which the excavation was performed, as referred to in findings 29, 35, 37, 38(d), and elsewhere in this report.

40. Although the cutoff trench below the main damsite was designed to have a maximum width of 150' and a particular configuration both horizontally and vertically, in actual fact the designed shape for the cutoff trench was followed only roughly. Its outlines became amorphous as it became progressively more necessary to excavate the contiguous foundation areas down to rock in order to reach suitable foundation conditions as determined by the contracting officer. Thus, the horizontal outlines of the cutoff trench became indistinguishable from the highly irregular surrounding foundation surfaces, in certain places extending from 300' to 500' in width in comparison to the maximum designed width of 150'. Due to th extreme irregularity of the rock surface which characterized much of the excavated dam foundation the cavity design disappeared or became indistinct.

41. By February 1, 1954, plaintiff had excavated in excess of 119,000 cu. yd. of Item 2 material (excavation overburden in open cut) from the main dam foundation, and by March 2, 1954, had exceeded the Government's prebid estimate of 420,000 cu. yd. of Item 2 excavated material from all areas of the project. Plaintiff was then ahead of its construction progress plan for excavation.

42. Of the overrun of 214,291 cu. yd. of excavation from the main dam foundation, the Government classified 208,597 cu. yd. (or 97.4 percent) as Item 2 material, the contract price for which was 53 cents per cu. yd., and 5,693 cu. yd. (or 2.6 percent) as Item 3 material at a contract price of $1.20 per cu. yd. Prior to bid the Government had estimated that 10 percent of the total excavation for the main dam foundation would constitute Item 3 material.

43. Paragraph 52 of the Specifications provides in pertinent part as follows:

> 52. *Classification of excavation.* Except as otherwise provided in these specifications, for stripping and com-

mon excavation in borrow areas, excavated materials will be classified for payment only as follows:

(a) Excavation, all classes, includes:

(1) Rock excavation.—Rock excavation includes all solid rock in place which cannot be removed until loosened by blasting, barring, or wedging, and all boulders or detached pieces of solid rock more than 1 cubic yard in volume. Solid rock under this class, as distinguished from soft or disintegrated rock under common excavation, which also requires blasting before removal, is defined as sound rock of such hardness and texture that it cannot be loosened or broken down by hand-drifting picks. No material, except boulders or detached pieces of solid rock, will be classified as rock excavation, which is not actually loosened by blasting before removal, unless blasting is prohibited and barring, wedging, or similar methods are prescribed by written order of the contracting officer.

(2) Common excavation.—Common excavation includes all material other than rock excavation and overburden excavation; including, but not restricted to, earth, gravel and also such hard and compact material as hardpan, cemented gravel, and soft or disintegrated rock, which cannot be removed efficiently by excavating machinery until loosened by blasting, also all boulders or detached pieces or solid rock not exceeding 1 cubic yard in volume.

(b) Excavation overburden.—Excavation, overburden, in opencut will include all common excavation which can be performed without blasting regardless of depth.

* * * It is desired that the contractor or the contractor's representative be present during measurement of materials excavated. On written request of the contractor, made within 20 days after the receipt of any monthly estimate, a statement of the quantities and classifications of excavation between successive stations or in otherwise designated locations included in said estimate will be furnished to the contractor within 10 days after the receipt of such request. The statement will be considered as satisfactory to the contractor unless specific objections thereto, with reasons therefor, are filed with the contracting officer, in writing, within 20 days after receipt of said statement by the contractor or the contractor's representative on the work. Failure to file such written objections with reasons therefor within said

20 days shall be considered a waiver of all claims based on alleged erroneous estimates of quantities or incorrect classification of materials for the work covered by such statement.

44. Paragraph 35(b) of the Specifications, entitled "*Excavation in open-cut*", provides in pertinent part as follows:

> (b) Excavation for foundations of dam and dike embankments.—The entire areas to be occupied by the dam and dike embankments or such portions thereof as may be directed by the contracting officer, shall be excavated to a sufficient depth to remove all materials not suitable for the foundation of the dam and dike embankments, as determined by the contracting officer. The unsuitable materials to be removed shall include all topsoil, rubbish, vegetable matter of every kind including roots, and all other perishable or objectionable materials that might interfere with the proper bonding of the embankments with the foundations, or the proper compaction of the materials in the embankments, or that may be otherwise objectionable. All loose, soft, or disintegrated rock shall be removed to the extent directed by the contracting officer from the abutments of the dam and dike embankments. Slopes of the abutments shall be reduced to provide satisfactory foundation contours, as shown on the drawings or as directed. Cut-off trenches, as shown on the drawings, shall be excavated to suitable rock foundations for the dam and dike embankments." * * *

45. In January 1953 Bu Rec officials conferred with each other on the question of classification of excavated materials. There was considerable difference of opinion as to the interpretation to be given the language of the specifications classifying excavated materials for payment purposes. The conferees decided that the criterion for classification of excavated materials between "Excavation—All Classes" and "Excavation—overburden" was as to whether blasting or its equivalent (i.e., barring and wedging) was necessary, a view sponsored by Mr. Goehring. By then the plaintiff had made verbal protests as to classification of some excavated material, but no written protest.

46. The plaintiff's first written protest of record regarding the Government's classification of excavation for pay pur-

pose was dated February 27, 1954, and read in pertinent part as follows:

> We are, at this time, protesting the method of classification with reference to contract item No. 3, Excavation, All Classes, in open cut.
> Contract paragraph No. 52, Classification of Excavation, provides that excavated materials will be classified for payment only as follows:
> (a) Excavation All Classes includes:
> (1) Rock Excavation
> (2) Common Excavation
> (b) Excavation, Overburden.
> Our interpretation of the contract classification of Excavation, All Classes includes the excavation of both rock and common materials, and the item of Excavation, Overburden includes only all overburden, which item of overburden, we interpret to include unsuitable materials such as top soil, float rock, rubbish, roots and other perishable materials.
> • • • • • •
> The specifications provide that Excavation, All Classes, includes both rock excavation and common excavation and therefore the use of explosives is not necessary to place the material into the All Classes classification. The item of Excavation, Overburden we interpret to be a surface-stripping excavation only and after the overburden has been excavated the material falls into the All Classes classification of excavation.

47. The plaintiff's protest of February 27, 1954, referred to in finding 45, remained unanswered for a protracted period. In the meantime there is no evidence that plaintiff made any formal compliance with the requirements of the concluding paragraph of paragraph 52 of the Specifications (finding 43, *supra*) as to challenging the monthly estimates of quantities and classifications of excavation. On October 22, 1954, the plaintiff's protest of February 27, 1954 was forwarded to Bu Rec by the Government's construction engineer, Mr. Goehring, with a request for a formal opinion as to proper criteria for excavation classification if the criteria agreed upon by the Bu Rec conferees in January 1953 (see finding 45, *supra*) was not to govern. Mr. Goehring's letter of October 22, 1954, to Bu Rec, enclosed a proposed letter of

reply to Adler which Goehring had prepared but had not sent to plaintiff pending approval by superiors at Bu Rec. By this time Goehring had discussed the excavation problem with Adler a number of times, and in the meantime by October 1, 1954, the overrun of excavation at the main damsite had reached approximately 184,000 cu. yd. (303,140 cu. yd. total excavation at main damsite less Government prebid estimate of 119,660 cu. yd.). By then also Adler had commenced to refill the excavated areas of the main damsite to form the dam embankment, so the physical features of certain areas of the foundation area were covered over and obscured from view, assuming their visibility would have aided in the excavation classification problem, or in the determination of foundation conditions encountered.

48. Having received no reply from his Bu Rec superiors to his communication of October 22, 1954, as referred to in the preceding finding 47, on April 26, 1956, Mr. Goehring wrote again to his Bu Rec superiors enclosing Adler's protest letter of February 27, 1954, and a proposed reply to it which Mr. Goehring had drafted but withheld pending authorization of his superiors to forward it to Adler. Mr. Goehring's letter of April 26, 1956 to his Bu Rec superiors reviewed the excavation classification problem, reported some intra-Bureau conflicts concerning proper interpretation of the earthwork specifications as to excavation classification, adhered to his earlier view that the proper criterion to distinguish between "all classes" excavation and "overburden" excavation was the necessity for blasting which characterized the former, discussed particular conditions where all-classes material must be blasted to get access to pockets of common excavation requiring removal, and enclosed sketches illustrating typical geological formations presenting this problem. The letter enclosed a proposed reply to Adler's original inquiry of February 27, 1954, which expressed "regret that reply has been delayed". It also stated that Adler had made no formal written protest to date but one was expected, and requested a Bu Rec opinion. By April 26, 1956, the project was nearing completion.

49. In classifying the excavated materials for pay purposes under the specifications, the Government classified and

paid for as overburden "The sand, mud and gravels, including loose detached rock of various sizes less than one cubic yard * * *". Plaintiff considers that such materials should have been classified and paid for as "Excavation—all classes". Plaintiff also contends that all of the 214,291 cu. yd. of overrun in excavation in the main dam foundation should have been classified and paid for as "excavation—all classes".

50. Plaintiff had an orderly plan for the progressive completion of the project, including sequentially: clearing of the construction and borrow areas, excavation of the diversion and outlet tunnels and of the two dike foundations, installation of grout cap concrete in the dikes, excavation of the vertical shaft for the tunnel, construction of a cofferdam at the downstream toe of the main dam by using some of the burden removed from the main dam area, diversion of the stream after completion of the tunnel and stilling basin, removal of all overburden from the bottom and abutments of the main damsite, excavation for and placement of grout cap concrete in main damsite, and drilling and grouting of the subfoundation area for the main dam. As soon as the foundation of the main dam had been completely excavated, including the cutoff trench, and the grout cap and grouting completed, it was then planned to commence the placement of fill for the main dam by placing limited amounts of Zone 2 (fine rock fill) and Zone 3 (large rock fill) materials at the downstream toe and spreading Zone 1 fill material (earth) over the rest of the bottom. The three types of fill for the main dam were to be placed over the entire damsite in successive layers from abutment to abutment and toe to toe so as to provide operating room for the efficient use of the earthmoving and placement equipment. Thereafter, the remaining concrete structures and roadways would be completed, temporary haul roads would be removed, the area generally beautified and landscaped, and the residuals of the contractor's presence removed. The plaintiff's progress chart projected removal of all the scheduled 420,000 cu. yd. of overburden by March 31, 1954, and completion of the entire project in 950 days ending June 25, 1955.

51. Plaintiff adhered roughly to its schedule until about February 1954. At the outset and subsequently as needed it

moved in an adequate supply of equipment in good condition. Equipment and labor forces were deployed at the outset as scheduled. The dikes were started in early 1953 and substantially completed by the end of the 1953 construction season without encountering any untoward subsurface conditions departing from those anticipated. The stripping excavation operation (i.e., overburden removal) for the main dam foundation was started in mid-1953 in the area of the abutments on either side of the dam and the lower reaches of the bottom area adjacent to both sides of the creek. By December 20, 1953, the cofferdam was completed with materials removed from the dam foundation, the outlet works and diversion tunnel were completed, and the creek diverted. Thereafter, the river section of the dam area was stripped and excavated and the materials thus obtained were used to complete the cofferdam. By the end of February 1954 plaintiff had excavated virtually all of the scheduled quantity of Item 2 overburden from the main dam foundation, but had not reached foundation surfaces suitable to the Government. By March 2, 1954, it had excavated the full amount of the Item 2 materials (420,000 cu. yd.) estimated by the Government for the entire project, and was accordingly slightly ahead of its own schedule at that time. By this time the plaintiff encountered the difficult subsurface conditions described elsewhere in this report (findings 37, 38(c), *supra*), as the Government representatives directed that excavation be continued until suitable foundation conditions were reached.

52. As a result of the subsurface conditions encountered in the excavation of the main dam foundation the plaintiff's plans for utilizing his equipment and labor forces were badly disrupted and thrown off schedule. He was forced to perform the foundation excavation and refill in piecemeal manner in small areas at a time instead of the large sections he had contemplated, thus frustrating the efficient use of his equipment and operating personnel. In stripping off unsuitable materials and excavating overburden he encountered numerous projections of solid, irregular rock, which deprived his construction equipment of room to maneuver efficiently in the confined areas dictated by the obstructions. In such areas his large tractors and high-speed, rubber-tired scrapers could

not be used to full advantage because of the abrupt drops and protrusions. Excavation and refill proceeded on a random, disorganized basis. Much of the excavation had to be performed with small backhoes and by hand instead of equipment designed for more efficient performance. Quantities of excavated material had to be loaded onto small trucks for removal, and the arrival and departure traffic pattern for these vehicles was forced by the terrain to be circuitous. Instead of being able to place fill in quantity sequence over large areas, it had to be accomplished in small segments as they became available. Material required abnormal rehandling. Ramps had to be constructed to enable vehicles to negotiate precipitate changes in elevations. In some areas from 15′ to 20′ of overburden had to be removed before hitting the tops of rock formations and dropping into pockets to additional depths of 10′ to 15′, some of which could not be reached by a ¾ yard backhoe. The conditions as described prevailed over extensive areas of the main dam foundation, and are graphically depicted in a number of photographs accompanying the record which were taken at progressive stages of performance. The depths of excavation are also reflected in the cross-section excavation drawings discussed in finding 38, *supra*. Since approximately 83 percent of all excavation and refill work to be performed in the entire project concerned the main dam itself, any substantial overrun of excavation in the main dam foundation area was critical to the construction progress of the entire project.

53. (a) On December 2, 1954, Bu Rec wrote its construction engineer at the worksite expressing concern that the plaintiff's revised construction program, because of the heavy overruns in excavation at the main damsite with which Bu Rec was familiar because of its increasingly accurate method of reporting excavation quantities, was four or five months behind the original completion schedule, and recommended that plaintiff be "urged to complete the work at the earliest possible date in order to minimize the assessment of liquidated damages". On May 4, 1955, a Government inspector visiting the worksite advised Bu Rec that "arrangements for speeding up his [plaintiff's] operation should be completed and in operation at present". After summarizing the work status and the overrun situation, the inspector concluded that "Unless

the contractor is able to better organize his work and speed up his operation it will be impossible to complete construction this year". On June 15, 1955, the construction engineer at the worksite advised Bu Rec that "We are continuing our advice that he [plaintiff] should accelerate production to complete the fill this calendar year". He anticipated the work would go into the winter months.

(b) On June 22, 1955, the construction engineer at Pactola, in acknowledging plaintiff's revised construction program which he said was not satisfactory, pointed out that it would be impossible to install any volume of Zone 2 rock fill and rock fines fill on the main dam embankment during the ensuing winter months of freezing weather because of the specification requirement for wetting the material, and continued:

> In order that the Bureau of Reclamation may meet its commitments, which are essential to completion of relocated Highway 85A, reroute of traffic, and start of water storage, it is necessary that the embankment be completed by the end of this calendar year, at the latest. Please review your construction program and equipment needs with a view to increasing production on all lagging features and particularly those rock items which you now indicate will not be completed until March 1956.

(c) On October 14, 1955, the construction engineer at Pactola described to Bu Rec the plaintiff's arrangements to procure additional equipment and items of additional work remaining to be done during the forthcoming cold weather. The letter stated:

> As you know, for many months we have been urging the contractor to acquire more equipment to expedite completion of his work. I feel that we have exerted every possible influence in that direction. From time to time we have been advised by him of proposed purchases, rental deals, and impending subcontracts, all of which failed to materialize.

54. During the progress of the work plaintiff called attention of Bu Rec representatives to changed subsurface conditions which it contended differed from those anticipated by the specifications and contract. On June 15, 1955, plaintiff wrote to Bu Rec requesting a 419-days' time extension, consisting of 234 days for overruns in overburden excavation at

the main dam foundation, and 185 days for a correlative overrun in excavation at Rock Source B needed to fill the main dam embankment. The request for a 419-days' time extension was reduced by plaintiff to 329 days by certain offsets which are not relevant to the immediate controversy. The letter left open the possibility of further time extensions being required before the job was completed, and stated as follows:

> Our present time for completion of the contract has been set as July 29, 1955; therefore it is of the utmost importance and urgency that the time for completing the contract be extended as quickly as possible. We cannot suffer the penalty of liquidated damages on Pactola Dam Contract, especially when such extensions of time are due to causes beyond our control.

Plaintiff made no request in the letter for an increase in monetary compensation.

55. Under date of July 13, 1955, the contracting officer issued his findings of fact on plaintiff's claim of June 15, 1955, in which findings of fact he extended the plaintiff's time for performance by 159 days (as compared to plaintiff's request for 329 days) due to overruns in excavation and refill. The 159 days' extension consisted of 42 days for overrun in Item 2, excavation, overburden, in open cut (646,000 cu. yd., instead of scheduled 420,000 cu. yd.); 110 days for overrun in excavation for fill placed in the dam foundation (including a concurrent 12 days for Change Order No. 3 involving substitution of gravel for rock fines fill); and 7 days for Extra Work Order No. 1 involving a matter not directly relevant to the present controversy. Paragraph 6 of the findings of fact attributed the bulk of the delay "to the overrun in excavation of overburden in preparing the dam foundation, and due to overrun of the volume of material contained in the lower portion of the dam". Government miscalculation of excavation and fill quantities was implicit in the finding of substantial overruns. The time extension was granted by the contracting officer under Article 9 of the contract entitled "Delays-Damages", on the basis of his finding that the overruns were an unforeseeable cause of delay beyond the control and without the fault or negligence of the contractor, and therefore contractually excusable. No findings

were made as to changed conditions which had been alleged by plaintiff in its protest of June 15, 1955.

56. On August 17, 1955, plaintiff filed a Notice of Appeal with the Department of the Interior Board of Contract Appeals, and on August 31, 1955, supplemented the notice with a letter which described the details of plaintiff's objections to the findings of the contracting officer. On November 17, 1955, the contracting officer withdrew his findings of fact issued July 13, 1955, pending further investigation to determine the full extent of the delays. In a letter to Adler dated November 22, 1955, the contracting officer stated as follows:

> Because the overrun of quantities cannot be definitely determined until near the end of the job, the supplemental findings will probably not be made until work under the contract is substantially complete. Our release of liquidated damages until the job is complete should *not* be taken as an indication that the supplemental findings of fact will excuse all of your delay. On the basis of information presently available it appears unlikely that all of your delay will be found to be excusable. Accordingly, you are urged to plan your operations for the winter and for next construction season to complete the work at the earliest possible date and thereby minimize the amount of liquidated damages to be deducted from your final voucher. In the event the supplemental findings do not excuse the entire delay, you can then appeal those findings and secure an administrative review of the entire matter.

57. Although the plaintiff had provided ample equipment for performance of the contract according to its original dimensions, as the substantial overruns in excavation and the difficult foundation conditions materialized it became apparent that additional equipment would be required to cope with the situation and to meet the Government's insistent demands for performance acceleration. Responding, the plaintiff in 1954 brought in a 2½ cubic yard Lima power shovel, six new Euclid quarry trucks, another Sheepfoot roller, and another large air compressor. In October 1955 plaintiff added five or six units of high-speed, rubber-tired, earthmoving scrapers and a D–8 dozer push cat brought from Wyoming and other South Dakota locations for dig-

ging and hauling, and four units of earthmoving belly-dump wagons imported from a Tiber dam job about 400 miles away from Pactola. The rough topography and pocketed work areas in the main dam foundation site prevented efficient utilization of equipment and required more equipment to accomplish less work than under more normal conditions, as explained in previous findings.

58. Paragraph 9 of the contracting officer's supplemental findings of fact issued July 11, 1956, reads in part as follows:

> 9. * * * However, the work was seriously curtailed early in November 1955 by severe cold weather and snow. Ordinarily the contractor would have been able to work until the middle of December with very little lost time due to weather. In spite of the severe weather of the 1955–1956 winter, the contractor kept the work going throughout the winter, although at a reduced rate, until warmer weather in April permitted the resumption of full-scale work on the excavation, all classes, items. Because the overruns forced the work to be performed over a longer period, extending over a severe winter season not anticipated when the contract was entered into, the contractor is entitled to an extension of time for any delay occasioned by the winter weather. Excavation, all classes, during the winter was only about 55 percent of the production during warmer weather. Accordingly, it is found that for the 5-month period from November 1955 to March 1956, inclusive, the contractor was delayed 45 percent of the time by a winter season not contemplated by the contract. * * *.

59. The winter of 1955–56, from November through March, was unusually severe, particularly the months of November and December which brought record low temperatures. The following excerpts from the Climatological Data published by the United States Weather Bureau for South Dakota indicate the conditions:

> NOVEMBER 1955
>
> This was the coldest November since 1896 with the temperature averaging 23.3°, 9.8° below normal. November 1896 was substantially colder with temperatures averaging 17.4°. This year, winter conditions began early with moderate snow in the middle and near the end of the month. In the open country, snow covered the ground

for a week or so and then thawed partially during a mild period. * * *.

* * * * *

* * * The general freeze-up of streams in the State occurred two to four weeks earlier than usual. * * *

* * * On the 16th, Rapid City had −14°, which was the lowest ever recorded so early in the season and also the lowest ever recorded there during the month of November. * * *.

DECEMBER 1955

The severe cold spell that began in November intensified during the first part of December, then came to an end shortly before Christmas. It was the 8th coldest December on record. Only three other Decembers have had a heavier snowfall. * * *.

Low temperature readings such as those experienced this month are not unusual, except ordinarily they occur later in the winter and are usually not so prolonged. The preceding month had seen only brief intervals of above-normal temperatures, and during the first three weeks of December there was no relief at all from the extreme cold. * * *. Below-zero readings were common and out-of-doors work was hampered considerably. * * * The average temperature for the month was 13.8°, 8.2° below normal.

* * * * *

* * *. Heating requirements, as estimated from degree-day computations, were 110 to 125% of normal for both the month and for the season to date. * * *.

JANUARY 1956

Dry and mild weather prevailed the first part of January followed by a return to wintery conditions the last half of the month. Across nearly all of the state temperatures averaged below normal for the third consecutive month. * * *.

* * *. Temperatures were below normal over all except the southwestern part of the state [where Pactola Dam is]. * * *.

FEBRUARY 1956

Temperatures were cold, but this February was not so severe as many previous ones since there were no major storms. * * *.

Temperatures were below the long-term means at all stations except Orman Dam, Ludlow 2 NW, and Rapid City * * * the warmest localities were found around the lower elevations of the Black Hills and in the Southwest. Highest temperature was 65° at Rapid City on the 23rd, * * *.

* * * * *

* * *. The heaviest snow of the month fell on the 15–16th, accompanied by near-blizzard conditions in the west and central on the 16th. Travel east of Rapid City was halted temporarily. * * *.

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Wintry conditions continued during much of March; however, near the end of the month there was some relief from the cold temperatures that had persisted since November. * * *.

Until May 1955 the weather readings closest to Pactola Dam were made at Rapid City, which is 1,283′ lower in altitude than Pactola (4,525′), and has temperatures from 3° to 7° lower than Pactola.

60. Pactola Dam is located in what is sometimes known colloquially as the "banana belt" of South Dakota, which has reference to its usually more moderate climate than the rest of the state. Plaintiff had scheduled its work under the original contract to be carried on as much as possible through the winter months, but did not contemplate working through the 1955–56 winter since the original completion date was June 1955. At the urging of the Government plaintiff worked under weather conditions in the 1955–56 winter which would ordinarily have caused him to suspend or reduce activities, particularly in November and December 1955. The work he accomplished during this period comprised mainly the drilling and blasting of rock in Rock Source B, loading the material thus blasted by power shovel into trucks and hauling them to the main dam embankment, dumping them there in the respective zones. Working under these conditions decreased the efficiency of plaintiff's equipment and manpower by causing frequent and serious breakage of equipment components, shovels, caterpillar bulldozers, caterpillar rock rakes, and quarry trucks; interfered with regular flow of

work; caused equipment starting difficulties; disrupted normal rock drilling, blasting and excavating, transportation and placement procedures. The severity of the 1955–56 winter accentuated the difficulties of contract performance which are common to normal winter weather, as in the preceding winters of Adler's performance at Pactola.

61. In April 1956 the Government and the bonding company knew that Adler was in serious financial straits and was having difficulty in meeting bills from suppliers and subcontractors. By June 1956 he owed $93,670 to Texaco, and $40,000 to the grouting drilling subcontractor, and was being pressed by the holders of substantial Miller Act claims. Plaintiff's financial straits resulted from a combination of factors, including the Government's decision not to correct the $136,000 error in plaintiff's bid (findings 5 through 25, *supra*), the changed subsurface conditions and consequent overruns of excavation and fill,[11] acceleration of contract performance through the 1955–56 winter, the disparity in plaintiff's corrected bid compared to competing bids, alleged misclassification of excavation, retained percentages of progress payments, and the Government's failure to pay him for certain Orders for Changes which plaintiff had performed sometime previously and the payment for which was subject to negotiation. Plaintiff had no precise knowledge as to whether he would eventually be charged liquidated damages for some part of his delays at the rate of $22,500 per month for, while his time for performance had been extended to January 4, 1956 (from July 29, 1955) by the contracting officer's findings of July 13, 1955 (see finding 55, *supra*), these findings were withdrawn on November 17, 1955, with the understanding that new findings would be prepared later when the full extent of the overruns and delays was more ascertainable, and that in the interim no liquidated damages would be assessed. The construction engineer advised Bu Rec in May 1956 that plaintiff intended to "make very substantial claims for extra costs on the ad-

[11] Excavation overruns are not an undiluted misfortune, and often are beneficial to the contractor who correctly computes his unit costs to allow a proper profit which may then be multiplied to his advantage by overruns. The basic problem in plaintiff's case was that the overruns occurred under extraordinarily difficult subsurface conditions which ran up his costs by impairing the efficiency of his operations.

mitted rather high overruns on certain specification items". A meeting was in prospect over these claims. In the meantime plaintiff could not know whether some liquidated damages would be eventually assessed for his delays. This uncertainty was not conclusively relieved until July 11, 1956, when the findings of fact issued by the contracting officer granted a time extension of 159 days to August 15, 1956, as compared to the 329 days plaintiff had requested June 15, 1955. Adler could reasonably have expected to receive a time extension commensurate with the overrun in excavation, but he did not know what this period would be as eventually determined by the contracting officer.

62. At the outset of a conference held between the parties on July 5 and 6, 1956, to determine the extent of the time extension to be granted and to agree upon extra costs of performance, the Bu Rec representatives proposed to extend the time for performance to April 27, 1956, which would have left plaintiff liable for liquidated damages beyond that date. By the end of the conference Bu Rec had agreed to extend the time to August 15, 1956, which was satisfactory to plaintiff, in that substantial completion by then was anticipated. At the conference the parties discussed plaintiff's claim that overruns on scheduled quantities of overburden and excavation, all classes, had resulted in additional costs, but after considerable discussion the Bu Rec representatives concluded that no changes had been made which would account for these overruns. The conferees also agreed upon issuing Order for Changes No. 5 to compensate plaintiff for 11 specified items of changed work in the total sum of $43,314.39, as described in finding 63, *infra*. At the conclusion of the conference the plaintiff signed the following letter to Bu Rec dated July 6, 1956, prepared by the latter:

> Reference is made to conference held with representatives of the Bureau of Reclamation on July 5 and 6, 1956, regarding our claims for extra work and changes in connection with Contract No. 14-06-D-254 for construction of Pactola Dam under Specifications No. DC-3783, Missouri River Basin Project.
>
> This will confirm understanding reached in conference that the payment by the Bureau of Reclamation of the sum of $43,314.39 to us for extras and changes as dis-

cussed at the conference will be accepted as settlement in full of all claims for additional compensation under the contract arising out of work performed to date.

Upon the Bureau's execution of a formal contract document providing for the above payment, all claims for additional compensation presently pending will then be considered as withdrawn without further action by the contractor, and no new claims for additional compensation will be made on the basis of anything occurring prior to July 6, 1956.

No reservations were specified in the foregoing release. The release was signed by plaintiff several days before the granting of a time extension by the contracting officer's findings of fact of July 11, 1956, and the receipt on July 18, 1956, of Order for Changes No. 5 paying plaintiff the sum specified in the release. Adler testified that he was required by Bu Rec to sign the release if he wanted to be paid the sum provided for in Order for Changes No. 5 which was promptly issued thereafter, but this is denied by Government witnesses. The release by Adler of all excavation and fill claims up to July 6, 1956, by payment of $41,618.04 for 5,822 cu. yd. in a relatively small area of the river section of the main dam foundation and $330.77 for excavation in the cutoff trench is inconsistent with the known existence of much more extensive claims for changed conditions and overruns as reflected in the exceptions reserved by Adler in connection with subsequent releases which he signed (see findings 67 & 78, *infra*). At this time Adler did not have access to full Government data as to excavation and fill quantities because Bu Rec was packing up its records as the completion of the project neared.

63. The figure of $43,314.39 referred to in the release letter of July 6, 1956, quoted in finding 62, is the increased cost allowed plaintiff by Order for Changes No. 5 which was dated June 14, 1956, but not received by plaintiff until July 18, 1956. Whether the conference between the parties on July 5 and 6, 1956, which ended with plaintiff signing the release letter, effected any changes in the original contents of the June 14, 1956 Order for Changes No. 5 cannot be determined. From the date sequence it would appear that at the July 5 and 6 conference the plaintiff merely approved

of or accepted the determinations that had already been made by Bu Rec and incorporated in the June 14 Change Order. Another possible explanation is that the Order for Changes was prepared at the July 5–6 conference but backdated to June 14 for unexplained reasons. Order for Changes No. 5 provides compensation totaling $43,314.39 for 11 listed changes, of which the first one accounting for $41,618.04 of the total, read as follows:

> In lieu of excavating all classes excavation to provide a reasonably uniform foundation surface in the river bottom area of the dam, you are directed to excavate overburden from crevices, cavities, and channels and refill such excavation to 1 foot above rock pinnacles with specially compacted Zone 1 material.

This work, which had been actually completed by plaintiff by September 20, 1954, involved 5,322 cu. yd. of additional excavation and fill, at the rate of $7.82 per cu. yd. Of the remaining ten items listed and paid for by Order for Changes No. 5, the second one paid $330.77 for 3,007 cu. yd. additional excavation in the cutoff trench at $0.11 per cu. yd., and this had been completed in July 1953. The remaining nine items in Order for Changes No. 5 totaled only $1,365.58 (including a deduction item of $103), and involved items of work not related to the main dam foundation. Under date of July 30, 1956, Adler executed a statement at the end of the Order for Changes No. 5 certifying that "Adjustment of the amount of compensation due under the contract and/or in the time required for its performance by reason of the changes ordered above is satisfactory and is hereby accepted." The Order for Changes No. 5 made no reference to time extensions for the extra work. All but two of the 11 items covered by Order for Changes No. 5 had been completed by late 1954.

64. On July 11, 1956, the contracting officer issued supplemental findings of fact which granted plaintiff a time extension of 332 days to August 15, 1956, and described the basis of the allowance in detail. These findings were a final response by the contracting officer to the plaintiff's letter of June 15, 1955, requesting a time extension, and were a substitute for and enlargement of the contracting officer's find-

ings of July 13, 1955 (finding 64, *supra*), which had been withdrawn November 17, 1955 in an order which suspended the assessment of liquidated damages until the facts could be more accurately determined. The latest findings of fact increased the time extensions previously granted by means of dividing the total amounts of overrun and fill by figures considered to represent typical daily production by the contractor based on his performance over a long period. Additional time extensions were based on other factors, including 68 days for delays caused by the severe 1955–56 winter in which the contracting officer estimated that the contractor could work at only 55 percent efficiency. No mention was made in the July 11, 1956 findings of fact of delay-damage claims by plaintiff, or of the claims referred to in Order for Changes No. 5 (finding 63, *supra*). The concluding paragraph of the July 11, 1956 findings of fact advised the plaintiff of his appeal rights under the contract. Since the time extension granted eliminated the prospect of liquidated damages, disagreement by plaintiff as to the method of computation became moot.

65. On August 15, 1956, the project was accepted by Bu Rec as being substantially complete, although there was a substantial amount of cleanup and beautification to be completed, roads to be eliminated, and debris buried. It was fully completed by January 8, 1957, and was considered to be very well constructed, attractive, and watertight.

66. After the substantial completion of the project on August 15, 1956, plaintiff performed certain additional work ordered by Order for Changes No. 6 dated July 20, 1956. This work related to raising a road grade, surfacing a parking area, and excavating a ditch on the side of a road through Rock Source B, for which on November 19, 1956, he accepted the sum of $5,463.30, as agreed to at a conference between the parties on November 7, 1956.

67. (a) On November 20, 1956, Adler executed a release form which provided in part as follows:

> Now, Therefore, in consideration of the premises and the payment by the United States to the contractor of the amount due under the contract, to wit, the sum of Two hundred thirteen thousand, five hundred sixty-two and 60/100 dollars ($213,562.60), the contractor hereby re-

misses, releases, and forever discharges the United States of and from all manner of debts, dues, sum or sums of money, accounts, claims, and demands whatsoever, in law or in equity, under or by virtue of the said contract, except contract items and quantities as listed on the reverse side hereof.

The reverse side of the release summarized the following exceptions totaling $198,633.20:

No.	Nature of Work	Excepted Quantity	Unit Price	Total
3	Excavation, all classes, in open cut	19,027 cy.	$1.20	$22,832.40
4	Excavation, all classes, for cut-off wall footings, grout caps, and cut-offs.	61 cy...	22.00	1,342.00
11	Excavation, common, in upstream borrow area and transportation to embankments, over 1,000,000 cy.	112,251 cy.	.37	41,532.87
12	Excavation, common, in downstream borrow area and transportation to embankment.	85,661 cy.	.39	33,407.79
14	Excavation, all classes, in rock source A and transportation to embankment over 182,000 cy.	21,455 cy.	1.10	23,600.50
16	Excavation, all classes, in rock source B and transportation to embankment, over 430,000 cy.	76,033 cy.	.90	68,429.70
21	Special compaction of earthfill	418 cy..	3.50	1,463.00
41	Furnishing and handling cement	153 bbl.	4.50	688.50
43	Concrete in cut-off wall footing and grout caps...	115.5 cy.	24.00	2,772.00
50	Concrete in dam embankment cut-off wall and outlet works stilling basin walls.	14 cy...	55.00	770.00
51	Concrete in spillway crest structure	22 cy ..	26.00	572.00
52	Concrete in highway pavement	19.3 cy..	24.00	463.20
OFC No. 3(c).	Excavation of gravel in upstream borrow area "F" and transportation to upstream and downstream Zone 2 embankment.	1,332 cy.	.57	759.24

(b) The $213,562.60 given as the consideration for the release consisted almost entirely ($212,319) of retained percentages, i.e., 10 percent of all the contractor's monthly earnings are retained until he has completed 50 percent of the work (in this case through August 1954), and are paid to the contractor upon completion and acceptance of the project and presentation by him of a certified voucher and, if required, an executed release, all as provided by Article 16 of the contract. The plaintiff contends that the release was void because of unlawful economic duress exercised at a time when he was financially prostrate. Further, that since there was allegedly no valid written contract, any release based on a contract provision would be void.

68. By letter dated November 20, 1956, plaintiff returned his release of that date, together with public voucher, labor

standards certification, and executed Order for Changes No. 6, to Bu Rec with the following letter:

> Enclosed are the following contract forms, properly executed, covering the construction of Pactola Dam as submitted to us by you on November 14, 1956:
>
> Form 1034, original, Public Voucher in the amount of $213,562.60.
> Certification concerning labor standards for the period ending September 11, 1956.
> Order for Changes No. 6, properly executed by us, in the amount of $5,463.30.
> Release on Contract, Form No. 7-292, in triplicate copy.
>
> The "Release on Contract", Form 7-292, has been properly executed by us with thirteen items of exceptions set forth on the release of contract. The exceptions indicated on the release are pursuant to Article 16 of the contract. During our conference in Denver with the various representatives of the Government on November 7, 1956, the officials were advised that exceptions would be set forth in the release on contract, and we also agreed that claims in connection with the exceptions to the release on contract, would be filed immediately. It is our desire to immediately review the government calculations and figures in connection with the contract items excepted in the release, which review may require about fifteen to twenty days, whereupon we will process our claims for all discrepancies discovered. We anticipate processing and filing of our claim or claims on or before March 1, 1957. We anticipate reviewing the government records immediately and before such records are transferred to the District Office at Huron, South Dakota.

69. On November 30, 1956, plaintiff received final payment under the contract in the amount of $213,562.60.

70. On August 23, 1957, Bu Rec wrote the following letter to plaintiff:

> In your letter of November 20, 1956, accompanying the release on contract, you stated that additional data on your claims excepted from the release on contract would be filed on or before March 1, 1957. Since that time I have heard nothing further from you regarding these claims.
>
> In order that we may close our files on this job, I propose to issue findings of fact in approximately 60 days using such information as we have on your claims if the additional data is not filed by that time.

71. On October 17, 1957, plaintiff wrote as follows to Bu Rec:

> Your letter dated August 23, 1957 and addressed to our Rapid City, South Dakota office has been forwarded to our new Englewood, Colorado office.
> The checking of the project office figures to prepare our claim for additional compensation in connection with Pactola Dam, Specifications No. DC–3783, is requiring considerably more time than was originally anticipated. We have discussed the several items within our claim with your office, verbally on three or four occasions since February 1957.
> Some of the items of work in question may require assistance from your office and/or engineering assistance because the government project records are not too clear in several instances.
> It is our desire to personally discuss some of the records and our findings with your office prior to the submission of our claim on several of the items of work involved; therefore we will greatly appreciate your delaying the issuance of Findings of Fact until the matters can be discussed with you.

72. On February 7, 1958, Bu Rec issued findings of fact and a decision by the contracting officer, which read in part as follows:

> 1. These findings of fact and decision are issued pursuant to the provisions of Article 15 of the contract identified above.
> 2. In executing the release on contract dated November 20, 1956, the contractor excepted 13 items of claim totaling $198,633.20. In each of the 13 items, the contractor contended that the quantities included in the final voucher were short. A copy of the release on contract is attached and marked "Exhibit 1." The executed release on contract was returned by the contractor with a letter dated November 20, 1956, in which he stated that the Government calculations would be reviewed immediately and any discrepancies would be called to the Bureau's attention on or before March 1, 1957. A copy of the contractor's letter of November 20, 1956, is attached and marked "Exhibit 2."
> 3. Having heard nothing further from the contractor on this matter in the meantime, the Government wrote to the contractor on August 23, 1957, advising that findings of fact would be issued in 60 days using the information then available. On October 17, 1957, the contractor

replied to that letter, requesting that issuance of the findings of fact be delayed until details of his claims could be discussed. Accordingly, a meeting was held on November 5, 1957. The discussions held then were inconclusive because the contractor had not completed his data required for detailed study of his exceptions. At the meeting, he did agree that his review of the Government calculations would be completed by the end of November 1957, and that he then would contact the Bureau to arrange an immediate meeting for discussion in detail of his exceptions to the release. To the date of these findings, the contractor has not contacted the Bureau further in regard to his claims, nor has he furnished any additional information. A copy of the letter of August 23, 1957, to the contractor is attached and marked "Exhibit 3," and a copy of his letter of October 17, 1957, is attached and marked "Exhibit 4."

4. As a result of the contractor's exceptions to the release on contract, the Government has reviewed the computations and has discovered an error in the quantity paid under Item 50, Concrete in Dam Embankment Cutoff Wall and Outlet Works Stilling Basin Walls. The quantity paid on the final estimate under this item was 827.8 cubic yards, whereas the quantity should have been 9.65 cubic yards larger. This quantity of concrete had been placed in the cutoff wall during 1954, and later computations overlooked this 9.65 cubic yards. At the bid price of $55.00 per cubic yard, the contractor is entitled to $530.75 additional payment for Item 50.

5. The computations for all other items listed by the contractor as exceptions to the release on contract have been carefully checked and no discrepancies have been found. Accordingly, it is the conclusion of the contracting officer that all of the contractor's claims, except that on Item 50, are without a proper basis in fact, and they are hereby denied.

6. In summary, it is found that the contractor is entitled to $530.75 additional compensation on Item 50 of the schedule of Specifications No. DC–3783, and that all other exceptions to the release on contract are without proper basis and they are denied.

73. On March 3, 1958, plaintiff filed a notice of appeal to the findings of February 7, 1958, and said, *inter alia:*

The Findings are not complete in that they do not give consideration to the extra costs incurred by reason of the overruns in Items 2, 4, 9, 11, 16, 17, 20, 21, 23, 40, 41, 42, 43 and 44 through 52 inclusive. The total of the addi-

tional quantities extended the performance of the contract beyond the period foreseeable at the date of execution. Such quantity increases indicate that the subsurface or latent conditions at the site differed materially from those anticipated by information furnished by the Contracting Officer.

It will be observed that no such claim was excepted from the operation of the release given by plaintiff on November 20, 1956 (finding 67, *supra*). Of the items mentioned by plaintiff in its notice of appeal, nothing in the release excepted any claim in connection with Items 2 (Excavation, overburden), 9, 17, 20, 23, 40, 42 or 44 through 49. Furthermore, as to items excepted from the operation of the release, the only exception was as to the accuracy of the quantities for which plaintiff had been paid. There was in the release no reservation of a claim for extra costs by reason of overruns or because of any extended performance period. In its appeal, plaintiff did not cite any claim as to Item 3 (Excavation, all classes, in open cut), or any claim as to misclassification of excavation.

74. The following letter dated March 20, 1958, was sent by Bu Rec to plaintiff:

> This will acknowledge receipt of your letter of March 7, 1958, with Notice of Appeal to the Findings of Fact dated February 7, 1958, in the matter of the above claim. The Notice of Appeal will be forwarded to the Board of Contract Appeals.
>
> A brief study of your appeal indicates your desire to review the project records and set forth in detail the points of alleged error on which you are basing your claims. It is agreed that any areas of alleged error should be delineated so that the hearings may be as brief and effective as possible.
>
> As regards Particulars I and III of your notice of appeal, the findings do not allege lack of diligence, as you find apparent, but only record and refer to correspondence and discussion pertinent to the claims. As recited in the findings, your letter of November 20, 1956, Exhibit 2, indicated that you immediately would review the final estimate calculations, and that you intended processing your claim on or before March 1, 1957. You obtained copies of the project data for that purpose. By letter of August 23, 1957, Exhibit 3, you were reminded that your specific claims had not been received. Pursuant to your

request of October 17, 1957, Exhibit 4, a meeting with you was arranged on November 5, 1957.

At that meeting, you stated that your review of the Government calculations would be completed by the end of November 1957, and that you would then contact this office to arrange an immediate meeting for discussion of details of your claims. You were assured at that meeting that every possible assistance in interpretation of the records would be given. All of the data were brought immediately to this office, reviewed, and arranged for ready reference at the proposed meeting.

When no communication was then received from you, you were reminded by telephone on various occasions, most recently on January 16, 1958, that all data were here for inspection, that assistance was available, and that this office desired to conduct the review at the earliest possible time. The project data have been here since mid-November 1957, and assistance has been at hand since that time. Inasmuch as the man who was Construction Engineer on Pactola Dam could not be held indefinitely for consultation with you, it became necessary to issue the findings based on the information then available.

It has been the desire and intention of the Bureau to meet with you and aid in every way to check, specifically, points of disagreement. If you wish assistance and a cooperative review of the calculations, will you please communicate with this office to arrange a meeting for that purpose in the immediate future. Assistance will be readily available until about May 1, 1958, except for the week of March 30 to April 5.

In the event that any errors in the calculations are discovered by our mutual efforts, in the period allowed by the Board of Contract Appeals for your filing of a brief, the findings will be revised, or reissued, to reflect any corrections that may be found to be justified.

[Note: As to the foregoing letter, plaintiff contends that by failing to complain that plaintiff's claim was improper because it exceeded the releases of July 6, 1956 and November 20, 1956, the contracting officer thereby waived reliance on the releases and waived objection to plaintiff's right to assert a changed condition belatedly.]

75. Pursuant to the Government's invitation as noted in the preceding finding, Adler, accompanied by an engineer employed by him, one Thomas Zolper, arrived at the Bureau's

offices in Denver on Tuesday, April 15, 1958. Thereafter, for the balance of the workweek, conferences were held between Adler and the Bureau engineers and measurements were were made by Adler, Zolper and the construction engineer, Goehring, from the project construction records. All of the contract items cited in the exceptions to plaintiff's release of November 20, 1956, were studied and there were no errors found in the Government's measurements as to Contract Items 3 (Excavation, All Classes, in Open Cut), 12, 14, 41 and Order for Changes No. 3, and those items were deleted from plaintiff's claims. The construction engineer, in a memorandum of the conference written May 1, 1958, says that he believed plaintiff's claim under Contract Item 51 had been similarly deleted (*ibid.*) and no claim under that item is prosecuted here. It is not entirely clear from the contemporaneous memorandum, but it is reasonable to construe that plaintiff did not object to the deletion of his claims for Items 3, 12, 14, 41 and 51, and Order for Changes No. 3, seemingly convinced by the Government's proof.

Errors in the Government's quantity measurements were found by the conferees in Items 11 and 16 as well as 50, the error in which had previously been corrected by the findings of fact of February 7, 1958. In Item 11, an arithmetical error had resulted in payment to Adler for some 13,719.2 cubic yards less than actually excavated, entitling him to a further payment for that item of $5,076.10. A similar error in Item 16 of 3,863.1 cubic yards entitled Adler to further payment of $3,476.79.

Disposition of these claims in the fashion above indicated left only four of the exceptions to the release Adler gave as to which no agreement had been reached at the end of the conference. These were Adler's exceptions to Items 4 (Excavation, All Classes for cutoff wall footings, grout caps and cutoffs), 21 (Special compaction of earthfill), 43 (concrete in cutoff wall footings and grout caps) and 52 (concrete in highway pavements).

76. Following the four days' conference, above described, Government engineers thought that Adler's claims on the four items not resolved (i.e., 4, 21, 43 and 52) might have some merit and the "records and computations were studied

again with a view to finding justifiable reasons and quantities for payment".

As a result, the Bureau decided to allow Adler 46.6 more cu. yd. on Item 4 than he had been paid for. At the time of the conference Adler was seeking payment for only 43.3 cu. yd., which at $22 per yard came to $952.50. The Bureau's allowance was somewhat larger, $1,025.20.

Adler's claim for special compaction of earthfill in the amount of 418 cu. yd. was allowed in full in the amount of $1,463.

Adler, who in his Release and at the conference, claimed he was entitled to payment for an additional 115.5 cu. yd. of grout cap concrete (Item 43), claimed only an additional 43.3 cu. yd. of grout cap excavation. The engineers were unable to see how Adler could claim so much more concrete fill than he had excavation. Study of batch counts led to an allowance of 48.1 additional cu. yd. of concrete to fill the void left by the extra excavation allowed (46.6 cu. yd., see *supra*), and in addition the Bureau found that another 37.5 cu. yd. had not been paid for. This led to an allowance on Item 43 of 85.6 additional cu. yd., warranting payment of an additional $2,054.40.

Adler's exception on the release of 19.3 additional cu. yd. of "concrete in highway pavement" (Item 52) was allowed in full.

77. Under date of November 14, 1958 (mailed to plaintiff January 29, 1959), the contracting officer issued supplementary findings of fact which discussed plaintiff's exceptions to its release and concluded (except for the *pro forma* paragraph as to right of appeal) as follows:

> 9. As a result of the review of the data, no errors or irregularities were found in the calculations for final payment for Items 3, 12, 14, 41, 51, and Order for Changes No. 3.
>
> 10. In his notice of appeal, dated March 3, 1958, the contractor requested an adjustment because the large overruns in several of the major items of the job forced the work to continue for a longer period than had been originally planned. A copy of the contractor's appeal of March 3, 1958, is attached and marked "Exhibit 2." The release on contract, copy of which is attached and marked "Exhibit 3," did not reserve such a claim. The

contractor's failure to except this claim from the operation of the release on contract precludes my considering the claim, and it is therefore denied.

11. In summary, it is found that the contractor is entitled to the following additional compensation on Items 4, 11, 16, 21, 43, and 52 of the schedule of Specifications No. DC–3783:

Item	Quantity	Price	Amount
4	46.6 cu yd	$22.00	$1,025.20
11	13,719 cu yd	0.37	5,076.03
16	3,563 cu yd	0.90	3,476.70
21	418 cu yd	3.50	1,463.00
43	85.6 cu yd	24.00	2,054.40
52	19.3 cu yd	24.00	463.20
			$13,538.53

The Findings of Fact dated February 7, 1958, showed that the contractor was entitled to $530.75 under Item 50 of the schedule of the specifications. Thus, it is found that the contractor is entitled to a total of $14,089.28 additional compensation. All other exceptions to the release on contract are found to be without proper basis and they are denied.

78. On January 30, 1959, plaintiff wrote the following letter to Bu Rec:

> We hereby acknowledge receipt of your letter dated January 29, 1959, in which you transmitted the Supplemental Findings of Fact and Decision dated November 14, 1958, in connection with the above named contract.
>
> Please be advised that we hereby accept said Supplemental Findings of Fact as satisfactory settlement of all claims under the afore-mentioned contract except as follows:
>
> We reserve all the rights in connection with our claim as outlined in Paragraph IV of our Notice of Appeal dated March 3, 1958, in which we claimed additional compensation for increased costs on the items stated therein, because these additional quantities extended the performance of the contract beyond the period foreseeable at the date of its execution.
>
> Accordingly, we do not accept Paragraph 10 of the afore-mentioned Supplementary Findings of Fact and Decision dated November 14, 1958, and a formal Notice of Appeal therefrom will be filed at a later date.

79. Subsequently, on February 28, 1959, plaintiff filed a timely appeal with the Interior Department's Board of Contract Appeals. On January 4, 1960, in IBCA–156, the Board sustained the Government counsel's contested motion to dis-

miss the appeal on the ground that the claims presented by Adler "sound either in misrepresentation or call for recovery of unliquidated damages," over which the Board had no jurisdiction. Thereupon, plaintiff filed the instant petition in this court on August 31, 1960.

80. Plaintiff's desperate financial status continued unabated through 1956, 1957, 1958, and thereafter (see finding 61, *supra*). The $213,562.60 he received as final payment on November 30, 1956 was applied to pay off about 120 suppliers and smaller creditors to avert Miller Act suits, leaving unpaid four or five larger creditors, including loans from the bonding company and the bank. For example: in November 1957 Texas Company sued Adler for $87,291.86; and in 1957 Dupont Company sued him for $50,673.78 for explosives; he owed the bonding company over $155,000, and the bank over $182,000. On the occasion of each of the successive releases to Bu Rec plaintiff was deeply in debt to his creditors and they were pressing for payment. In 1958 he sold virtually all his equipment at auction in order to meet unpaid bills. It was stipulated by the parties that plaintiff's total loss in performing the contract was not less than $285,833.23. This figure does not include plaintiff's additional claims, for costs related to depreciation, inventory depletion, partners' salaries, some overhead, interest on borrowings, and certain additional labor costs. Nor does it include additional claims for unliquidated damage costs for changed conditions, work acceleration, and misrepresentation. Plaintiff's financial position was such that, at the completion of the job, he was unable to obtain performance bonds to undertake other contracts.

81. Voluminous evidence was taken, and requested findings and briefs filed, on the issue of damages, but these findings intentionally omit reference to the damage issue because of disposition of the liability issue as described in the accompanying opinion.

Conclusion of Law

Upon the foregoing findings of fact and opinion, which are adopted by the court and made a part of the judgment herein, the court concludes as a matter of law that plaintiff is not entitled to recover and the petition is dismissed.

IN THE UNITED STATES COURT OF CLAIMS

Cong.		
10-60	ADLER CONSTRUCTION COMPANY, a partnership constituted of HAROLD C. ADLER and VERA L. ADLER, Partners.	v.
142-67	MISSOURI PACIFIC RAILROAD COMPANY	THE UNITED
371-68	WILLIAM D. JONES	
364-69	"J" "C" LACKEY	STATES
392-69	ROBERT ALEXANDER	

Before COWEN, Chief Judge, LARAMORE, DURFEE, DAVIS, COLLINS, SKELTON and NICHOLS, Judges.

ORDER

These cases come before the court on motions for rehearing, to alter or amend judgment, for reconsideration and for further relief under Rules 151 and 152 of the Rules of this court and, on consideration thereof,

IT IS ORDERED this 15th day of July, 1970, that said motions be and the same are denied as follows:

Cong.

10-60 Adler Construction Company, a partnership constituted of Harold C. Adler and Vera L. Adler, Partners. Plaintiff's motion for a rehearing to alter or amend judgment.

142-67 Missouri Pacific Railroad Company. Defendant's motion for reconsideration or rehearing.

371-68 William D. Jones. Plaintiff's motion for reconsideration.

364-69 "J" "C" Lackey. Plaintiff's motion for reconsideration of the court's order dated April 3, 1970, dismissing the petition of the plaintiff.

392-69 Robert Alexander. Plaintiff's motion to rehear.

BY THE COURT
/s/ Wilson Cowen
Chief Judge

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 829

ADLER CONSTRUCTION COMPANY, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. App. A–1—A–8) is reported at 423 F. 2d 1362.

JURISDICTION

The judgment of the Court of Claims was entered on April 17, 1970, and a motion for rehearing was denied on July 15, 1970. The petition for a writ of certiorari was filed on October 9, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether a release signed by a government contractor bars him from presenting certain claims against the United States.

STATEMENT

This is a suit based on certain claims arising out of a 1952 government contract for construction of a dam. The Court of Claims found that these claims were barred by a valid release petitioner had signed.

A. THE EVIDENCE

In August 1952 the Bureau of Reclamation issued an invitation for bids on the construction of the earth-filled Pactola Dam in South Dakota. Congress approved the project for immediate construction in order to make available a much needed water supply for an air base (Pet. App. A–20—A–21). Since the work was of "a highly urgent nature," it was important that construction begin before the onset of winter weather in 1952; otherwise a full season's delay would result. *Id.*

Prior to bidding, Adler thoroughly explored the entire project site (Pet. App. A–10). He then submitted a bid of $3,761,115, some 23 per cent under the second low bid of $4,878,476 (Pet. App. A–11). The invitation to bid specified that a bidder would not have any right to secure relief "on the plea of error in the bid" or of negligence in making the bid (Pet. App. A–10).

On September 30, 1952, the bids were opened. The Board considering the bids believed that "the low bidder could not complete the work at his bid prices without considerable strain on his financial resources" (Pet. App. A–11). However, it recommended acceptance because "he is known as a conscientious and skill-

ful contractor, and unquestionably would prosecute the work vigorously and in full compliance with the terms of the specifications" (Pet. App. A–11—A–12).

Later that day, when Adler learned of the disparity in his bid, he expressed shock, but because of his involvement in litigation, he did not confer with government representatives until October 7, 1952 (Pet. App. A–12). At that time, he told the government officials that "he may have made a mistake" and wrote to the Chief Engineer, requesting that the awarding of the contract be delayed (Pet. App. A–12—A–13). On October 11, the Chief Engineer informed him that the Government would "withhold making the award a reasonable length of time," but that it was necessary to start the project as soon as possible (Pet. App. A–13).

On October 14, the Bureau of Reclamation awarded the contract to Adler, at which time Bureau officials advised him to submit an affidavit explaining his errors, which would be transmitted to the Comptroller General for advice as to bid revision, award to the next low bidder, or contract readvertising (Pet. App. A–14). Adler was told that any correction would have to be effectuated by the Comptroller General because the Bureau's officials lacked such authority (Pet. App. A–14—A–15). The contracting officer forwarded the statement to the Commissioner of the Bureau of Reclamation along with the recommendation that the Comptroller General be asked to permit an appropriate reformation of the contract (Pet. App. A–16). The Bureau accepted the

recommendation, which was forwarded to the Comptroller General for a decision (Pet. App. A–16).[1]

On November 14 the Comptroller General determined that "[u]nder all the circumstances, this Office will not be required to object to the correction of the bid" (Pet. App. A–20—A–21) and three days later Adler met with Bureau of Reclamation representatives in Denver to reform the contract.[2]

The Bureau was apparently concerned that Adler's corrected prices for certain items were more than the government's prebid estimates or the bids of other contractors regarding the same items (Pet. App. A–17). Consequently, the Bureau's representatives informed Adler they would not allow corrections that exceeded these amounts. They also emphasized that no further delay would be permitted, that Adler would have to sign the contract documents immediately, and that a notice to proceed would be issued that day (Pet. App. A–17). Adler then signed an amendatory Agreement[3] which increased the contract price by $485,265, an amount $136,240 less than the increase of $621,505 Adler had sought (Pet. App. A–19).[4] In a letter to the Senate Judiciary Committee in 1960, when peti-

[1] Adler was not advised of these favorable recommendations by the contracting officer and the Bureau (Pet. App. A–16—A–17).

[2] A text of the Comptroller's decision was not yet available (Pet. App. A–17).

[3] At the same time he signed the basic contract (Pet. App. A–20).

[4] From the contract, as amended, Adler could have expected to earn a profit of $557,696 (according to the government's interpretation), or $271,083 (according to Adler's interpretation) (Pet. App. A–21).

tioner had a private bill for relief pending, the Undersecretary of the Interior stated that the proposal embodied in the amendatory agreement "in good conscience * * * should never have been made" because, even if the full increase had been allowed, the government would have "had the advantage of an exceedingly low bid" (Pet. App. A–23—A–24).

After the signing of the agreement, Adler commenced work, with an initial completion date of June 25, 1955 (Pet. App. A–24). However, as work progressed, he encountered subsurface or latent conditions at the site of the main dam foundation materially different from those shown in the drawings and specifications, which made excavation and refill work much more difficult and costly (Pet. App. A–25—A–34). At the urging of the Bureau of Reclamation (Pet. App. A–46), Adler continued working during the winter of 1955–1956 under severe weather conditions in order to minimize delays (Pet. App. A–49).

Early in July, 1956, the parties held a conference to determine how far the contract completion date should be extended [5] and to agree upon extra costs of performance. The Bureau of Reclamation, which had originally proposed an extension to April 27, 1956, agreed to extend the time to August 15, 1956. The Bureau also agreed with Adler to allow him $43,314 for 11 specified items of changed conditions. At the conclusion of the conference, Adler signed a letter confirming this agreement. The letter stated that "the

[5] Adler had requested such an extension in mid-1955 (Pet. App. A–44, A–45).

payment by the Bureau of Reclamation of the sum of $43,314.39 * * * for extras and changes * * * will be accepted as settlement in full of all claims for additional compensation under the contract arising out of work performed to date," and that "no new claims for additional compensation will be made on the basis of anything occurring prior to July 6, 1956" (Pet. App. A–51—A–52).

On August 15, 1956, the project was substantially completed (Pet. App. A–54). As contemplated by the basic contract,[6] Adler on November 20, 1956, executed a release which provided that in consideration of the payment by the United States to him of the amount then due under the contract, $213,562.60, he "releases and forever discharges the United States of and from all manner of debts, dues, sums or sums of money, accounts, claims and demands whatsoever, in law or in equity, under or by virtue of the said contract, except contract items and quantities as listed on the reverse side hereof" (Pet. App. A–54—A–55; Def. Exh. 30). On the reverse side of this release Adler listed 13 exceptions totalling $198,633.20 (Pet. App. A–55).

[6] The basic contract provided that upon completion of the project "the amount due the contractor under this contract will be paid upon the presentation of a properly executed and duly certified voucher therefore, after the contractor shall have furnished the Government with a release, if required, of all claims against the Government arising under and by virtue of this contract, other than such claims, if any, as may be specifically excepted by the contractor from the operation of the release in stated amounts to be set forth therein" (Def. Exh. 1, Art. 16; Pet. App. A–55).

Following his signing of this release and his receiving the $213,562, Adler administratively asserted claims for extra payment. On the basis of the claims that he had excepted from the November 20, 1957, release, Adler received $14,089 additional compensation (Pet. App. A–63); he was not, however, given anything on claims not excepted from that release (Pet. App. A–62—A–64).

B. THE COURT OF CLAIMS DECISION

This proceeding began in 1960 by a Congressional reference to the Court of Claims. In July 1964, the Court of Claims held that it could not accept jurisdiction as a Congressional reference case, but that it had jurisdiction under 28 U.S.C. 1491. Petitioner's principal claims related to the government's failure fully to correct the mistakes in Adler's bid, unanticipated subsurface conditions, excavation overruns, disputed excavation classification, work acceleration, and collateral matters (Pet. App. A–9). He sought recovery in excess of $800,000.

The Court of Claims, adopting the trial commissioner's decision, ruled that Adler was not entitled to recover (Pet. App. A–1—A–64). It held that "none of the claims constituting the present action were excepted from" the release Adler signed on November 20, 1956, in which he released the United States from all claims arising out of the contract, with 13 specified exceptions (Pet. App. A–3). The court concluded that the release was valid, notwithstanding Adler's claim that he had been economically coerced into signing

it. The court stated: "[N]o conceivable economic coercion could invalidate a release where, as here, there is no evidence that plaintiff was restricted in the scope of his exceptions to the release" (Pet. App. A–4).

ARGUMENT

1. The release of November 20, 1956, was in accordance with the contract of November 17, 1952, which stated that upon completion and acceptance of the work, the amount due the contractor will be paid upon presentation of a voucher "after the contractor shall have furnished the Government with a release, if required, of all claims against the Government arising under and by virtue of this contract, other than such claims, if any, as may be specifically excepted by the contractor from the operation of the release" (Def. Exh. 1, Art. 16; Pet. App. A–55).

Adler challenges the contract on the ground that it was obtained through duress and the government's taking advantage of his mistaken bid. However, where a party desires to rescind a contract upon grounds such as duress or mistake, he must assert his right to rescind without delay, and he waives his right to rescission by electing to perform under the contract. See, *e.g.*, *Grymes* v. *Sanders*, 93 U.S. 55, 62; *Barnette* v. *Wells Fargo Nevada Nat. Bank*, 270 U.S. 438; *Lichter* v. *Goss*, 232 F. 2d 715 (C.A. 7); *Lewis* v. *Lowry*, 322 F. 2d 453 (C.A. 4), certiorari denied, 368 U.S. 977; *Gallen* v. *Lloyd-Thomas Co.*, 264 F. 2d 821 (C.A. 8); 5 Williston, *Contracts*, Rev. Ed., §§ 1580, 1594, 1626. Adler, having elected to perform under

the basic contract and receive payment under it, is bound by its terms—including the requirement that he execute a release upon completion of the work.

2. A release such as Adler signed in November 1956 bars the assertion of any claim not specifically excepted therefrom. *E.g., United States* v. *William Cramp & Sons, Inc.*, 206 U.S. 118; *H. L. C. & Associates Constr. Co.* v. *United States*, 176 Ct. Cl. 285, 367 F. 2d 586; *Watts Construction Co.* v. *United States*, 161 Ct. Cl. 801, 355 F. 2d 573. See also *Vann* v. *United States*, 420 F. 2d 968, 972 (Ct. Cl.). While the release itself may be avoided if it was obtained by duress, *e.g., Aircraft Associates & Mfg. Co.* v. *United States*, 174 Ct. Cl. 886, 357 F. 2d 373,[7] ample evidence supports the finding of the Court of Claims that the release was not so obtained. When Adler signed it, he was free to except any claims he wished, and he listed 13 exceptions totalling $198,633.20 (Pet. App. A–55).

Adler contends that he did not list his present claims among the exceptions because he thought he was barred from doing so by the earlier release, dated July 6, 1956 (Pet. 18).[8] But the difficulty with this contention is that the claims petitioner did except also related to work performed prior to July 6, 1956, the date of the first release (Pet. App. A–52). This is simply further support for the Court of Claims' find-

[7] See also *Robertson* v. *Frank Bros. Co.*, 132 U.S. 17, 23.

[8] This release was a letter providing that all pending claims arising up to July 6, 1956, were withdrawn and "no new claims for additional compensation will be made on the basis of anything occurring prior to July 6, 1956" (Pet. App. A–51—A–52).

ing that the government, by presenting the second release to petitioner with the opportunity for him to note exceptions, waived the first release (Pet. App. A–3).[9]

Thus, there is no justification for Adler's failure to list the claims involved here along with the 13 exceptions to the November release.[10] As the Court of Claims found, Adler was exercising "his own free choice" in listing 13—and only 13—exceptions to the release (Pet. App. A–4). Adler signed the November release free

[9] The government by its subsequent conduct can waive provisions of a release which are in its favor. See *Winn-Senter Construction Co.* v. *United States*, 110 Ct. Cl. 34, 65–66, 75 F. Supp. 255, 260.

[10] Adler contends that at the time of the signing of the November release he lacked certain relevant information which the government had, such as a revised drawing of the main dam foundation and knowledge that the Bureau had recommended to the Comptroller General full correction for Adler's mistaken bid (Pet. 13). The Court of Claims properly answered that his lack of this information does not excuse his failure to state his exceptions covering his present claims in general terms, which would have preserved his right to pursue them (Pet. App. A–4).

from duress, and there can be no question of its validity.[11]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1970.

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[11] Petitioner argues (Pet. 20–21) that recovery may be on a quantum meruit basis even if no recovery is permitted on the contract. However, the November 20, 1965, release releases the United States "from all manner of debts, dues, sums or sums of money, accounts claims, and demands whatsoever, in law or equity, under or by virtue of the said contract" except for the listed exceptions (Pet. App. A–55). Such language bars a quantum meruit claim, which arises by virtue of the contract. See *United States* v. *William Cramp & Sons, Inc.*, *supra*, at 206 U.S. 127–128.

Petitioner also contends (Pet 13–14) that the Bureau of Reclamation, in allowing only partial correction of the bid instead of full correction, acted contrary to a decision of the Comptroller General. The decision of the Comptroller General, however, was simply that "[u]nder all the circumstances, this Office will not be required to object" to full correction of the bid (Pet. App. A–20—A–21).

U.S. GOVERNMENT PRINTING OFFICE: 1970